[redacted]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 919.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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1 APRIL SESSION, 1908.

Charles J. Bonaparte, 97 Robert W. de Forest, John G. Johnson. — United States of America *vs.* Lehigh Valley Railroad Company.

1908, June 5. Bill of complaint filed.
1908, June 5. Subpœna issued returnable the first Monday of July.
1908, June 5. Order for the appearance of Robert W. de Forest and John G. Johnson, esquires, for defendant, filed.
1908, June 13. Answer filed.
1908, June 15. Printed copy of bill of complaint filed.
1908, June 16. Stipulation of counsel filed.
1908, June 16. Replication filed.
1908, June 16. Argued.
1908, June 17. Ordered that defendant file brief by June 25, 1908, and that complainant file reply brief by July 1, 1908.
1908, September 10. Opinion dismissing bill in equity filed.
1908, October 6. Dissenting opinion by Buffington, J., filed.
Decree dismissing bill of complaint filed.
Assignments of error filed.
Petition for appeal filed.
Order allowing appeal filed.
Citation allowed and issued.
Citation returned "service accepted" and filed.

2 No. 97. April sessions, 1908. In equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *vs.* LEHIGH VALLEY RAILROAD COMPANY, DEFENDANT.

Bill of complaint.

(Filed June 5, 1908. Henry B. Robb, clerk. By L., deputy clerk.)

4 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, complainant, *vs.* LEHIGH VALLEY RAILROAD COMPANY, defendant. — April sessions, 1908. No. 97. In equity.

To the Honorable, the Judges of said Court:

The United States of America, by Charles J. Bonaparte, its Attorney-General, brings this, its bill of complaint, against the Lehigh Valley Railroad Company, a railroad company hereinafter more

particularly described. And therefore your orator complains and says:

(1) That the said "Lehigh Valley Railroad Company," herein designated and called "the defendant," is a corporation created, organized and existing under the laws of the State of Pennsylvania, having its principal office in the State of Pennsylvania, at the city of Philadelphia, and has been such corporation since long before the first day of May, in the year nineteen hundred and eight.

5 (2) That the defendant is, and has been during its corporate existence, a railroad company now, and for some time past, operating, with its branches and connections, a railroad whose lines extend through parts of the States of Pennsylvania, New Jersey, New York, and other States. That it is, and has been since long before the said first day of May, in the year nineteen hundred and eight, a common carrier within the meaning of an act of the Congress of the United States, approved February 4, 1887, entitled "An act to regulate commerce," and of all acts supplementary thereto or amendatory thereof; and that, as such common carrier, it is, and has been through all the period aforesaid, engaged in interstate transportation, particularly in the transportation, in interstate commerce, of the article or commodity known as "anthracite coal" from the mines and the mining lands in the State of Pennsylvania to the markets of other States.

(3) That the defendant is, and has been continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of the entire capital stock of the Lehigh Valley Coal Company and of Coxe Brothers & Co., Incorporated, corporations of the said State of Pennsylvania, and that it thus controls, and has been controlling, the election of the directors or managers of said coal companies. That said coal companies hold, by conveyances and leases made long before the said first day of May, in the year

6 nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Carbon, Lehigh, Luzerne, and Wyoming, in the said State of Pennsylvania; but said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the direct management of the respective presidents and directors of said coal companies, the president of each of said coal companies being, as he has been for a long time past, the president of the defendant, and a majority of the directors of each of said coal companies being officers or directors of the defendant, as they have been for a long time past. That by virtue of the ownership of the entire capital stock of said coal companies by the defendant, as hereinbefore stated, the defendant owns said coal lands and coal mines, and the anthracite coal therein or thereupon and mined, and being mined, therefrom, and has an interest therein; and that, by virtue of the management of said coal companies by certain of the officers of the defendant, as hereinbefore stated, the operations of said coal com-

panies in the mining of anthracite coal, have been, and are now being, carried on by and under the authority of the defendant.

(4) That, apart from the coal lands, coal mines, and coal hereinbefore mentioned and described, the defendant is, and has been
7 continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of a large majority of the capital stock of the New York and Middle Coal Field Railroad and Coal Company and of the Locust Mountain Coal and Iron Company, corporations of the said State of Pennsylvania, and that it thus controls, and has been controlling, the election of the directors or managers of said coal companies. That said coal companies hold, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the said counties of Carbon, Lehigh, Luzerne, and Wyoming; but said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the direct management of the respective presidents and directors of said coal companies, the president of each of said coal companies being, as he has been for a long time past, the president of the defendant, and all of the directors of each of said coal companies being officers, directors, or servants of the defendant, as they have been for a long time past. That, by virtue of the ownership of a majority of the capital stock of said coal companies by the defendant, as hereinbefore stated, the defendant practically owns said coal lands and coal mines,
8 and the anthracite coal therein or thereupon and mined, and being mined therefrom, and is, also, owner thereof in part, and, likewise, has an interest therein; and that, by virtue of the management of said coal companies by certain officers, directors, and servants of the defendant, as hereinbefore stated, the operations of said coal companies, in the mining of anthracite coal, have been, and are now being, carried on by and under the authority of the defendant.

(5) That, moreover, the defendant is, at the present time, and has been for a period since long before the said first day of May, in the year nineteen hundred and eight, the owner of some part of the capital stock of the Highland Coal Company, of the Packer Coal Company, and of the Temple Iron Company, corporations of the said State of Pennsylvania, which hold, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the said counties of Carbon, Lehigh, Luzerne, and Wyoming, which said coal lands and coal mines are being operated, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, in the mining of anthracite coal, by and under the direct management of their respective boards of directors, the defendant being represented on each and every of

said boards of directors by one or more persons who is, or are,
9 in every such case, an officer or director, or officers or directors,
of the defendant, as they have been, respectively, for a long time past. That, by virtue of such stock ownership in each and every of said last-mentioned coal companies, the defendant owns in part, and has an interest in, said last-mentioned coal lands and coal mines of the three said last-mentioned coal companies and the anthracite coal therein or thereupon and mined, and being mined, therefrom; and that, by virtue of the management of said last-mentioned coal companies by directors one or more of whom is, or are, in each case, an officer, or officers, of the defendant, as hereinbefore stated, the operations of said last-mentioned coal companies, in the mining of anthracite coal, are being carried on, as they have been in the past, by and under the authority of the defendant, as well as by and under the authority of other persons or corporations.

(6) That from time to time since the first day of May, in the year nineteen hundred and eight, and at the present time, of the anthracite coal so mined and being mined, as aforesaid, there has been, and there is being, loaded at, or near, the mines and lands from which said coal has been, and is being, mined as aforesaid, and within the counties aforesaid, upon the cars of the defendant, for transportation in interstate commerce, a large quantity, the number of tons whereof being
to your orator unknown; that such large quantity of coal, when
10 so loaded as aforesaid, has been, and is being, carried and
transportated in the cars aforesaid, over and upon the said railroad, and its branches and connections, of the defendant, and through and over territory of the said State of Pennsylvania within the jurisdiction of this court, and from the said State of Pennsylvania, by continuous carriage, in interstate commerce, across the boundary line of the said State of Pennsylvania to and into the States of New York, New Jersey, and other States for sale and delivery at the markets of the said States of New Jersey, New York, and other States; and that such large quantity of anthracite coal, so transported as aforesaid, was not, and is not, necessary and intended for the use of the defendant in the conduct of its business as a common carrier.

(7) That, the defendant being the owner, and part owner, of the anthracite coal mined, and being mined, and transported, and being transported, as aforesaid, and such coal having been, and being, mined by the defendant, and under its authority, as aforesaid, and the defendant having an interest in said coal as aforesaid, the transportaton of said coal as aforesaid was, has been, and is, unlawful, being a failure to comply with, and a violation of, the fifth paragraph of the first section of said "act to regulate commerce" as said section was amended by an act of the Congress of the United States, approved June 29, 1906, which prescribes:

"From and after May first, nineteen hundred and eight, it shall be
unlawful for any railroad company to transport from any
11 State, Territory, or the District of Columbia, to any other

State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

(8) That not only is said anthracite coal now being mined by and under the authority of the defendant and loaded on the cars of the defendant for transportation in interstate commerce, as hereinbefore set forth, but it will be so mined and loaded in the future; and that it is the purpose of the defendant to continue the same unlawful transportation of said coal, so to be mined and loaded upon the cars of the defendant as aforesaid, as has been hereinbefore described, in violation of the law hereinbefore quoted.

(9) And so your orator says that the anthracite coal so as aforesaid being unlawfully transported by the defendant in interstate commerce, and the anthracite coal which it is the purpose of the defendant to continue to so unlawfully transport as aforesaid, in violation of the law hereinbefore quoted, is, and will be, "an article or commodity, other than timber and the manufactured products
12 thereof, manufactured, mined, or produced by it, or under its authority," and, also, such "article or commodity" owned by it "in whole or in part," and is, likewise, "an article or commodity, other than timber and the manufactured products thereof," in which it has, and will have, an "interest direct or indirect;" and is not "an article or commodity" "necessary and intended," or which will be necessary and intended, "for its use in the conduct of its business as a common carrier."

To the end, therefore, that your orator may have that relief which it can only obtain in a court of equity; that the said defendant, "Lehigh Valley Railroad Company," may make full answer under oath to all the allegations herein; and that an injunction be granted to enjoin and prohibit the said "Lehigh Valley Railroad Company" from further transporting, in interstate commerce, the anthracite coal which it is the purpose of the said defendant to transport, as hereinbefore stated, in violation of the law hereinbefore quoted; and that your orator may have such further or other relief in the premises as the nature and circumstances of the case may require.

May it please your honors to grant to your orators a writ of subpœna, to be directed to the said "Lehigh Valley Railroad Company," thereby commanding it, at a certain time therein to be limited, personally to appear before this honorable court and then and there full,
true, direct and perfect answer make to all and singular the
13 premises, and to perform and abide by such order, direction and decree as may be made against it in the premises, and as shall seem meet and agreeable to equity.

And your orator will ever pray.

CHARLES J. BONAPARTE,
Attorney-General.

18 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
vs. April session, 1908. No. 97.
LEHIGH VALLEY R. R. COMPANY.

Enter our appearance for defendant in the above case. June 5th, 1908.

ROBERT W. DE FOREST,
JOHN G. JOHNSON,
Per F. MARKO RIVINUS,
Attorneys for Defendant.

TO CLERK OF SAID COURT.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 97. April session, 1908. U. S. of America v. Lehigh Valley R. R. Company. Order for appearance. Filed Jun' 5, 1908. Henry B. Robb, clerk. By L., deputy clerk. Robert W. de Forrest, John G. Johnson, attorneys for defendant.

19 97. April sessions. 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, complainant, *versus* LEHIGH VALLEY RAILROAD COMPANY, defendant. | April sessions, 1908. In equity.

Answer of Lehigh Valley Railroad Company.

J. F. SCHAPERKOTTER,
Solicitor for Defendant,
143 Liberty street, New York City, N. Y.

FRANK H. PLATT,
Of Counsel.

(Filed June 13, 1908. Henry B. Robb, clerk. By L., deputy clerk.)

21 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, complainant, *versus* LEHIGH VALLEY RAILROAD COMPANY, defendant. | April sessions, 1908. No. 97. In equity.

The defendant, Lehigh Valley Railroad Company, for answer to the bill of complaint of the United States of America, complainant

herein, or to so much thereof as this defendant is advised it is material or necessary for it to answer, respectfully shows:

1. This defendant admits that it is a railroad corporation organized and existing under certain laws of the Commonwealth of Pennsylvania, hereinafter specified, having its principal office at the city of Philadelphia in said Commonwealth, and that it now is, and since long before May 1, 1908, has been, a common carrier by railroad of passengers and property, and engaged in interstate commerce,
22 including the transportation in interstate commerce of anthracite coal from the mines and mining lands in the State of Pennsylvania to the markets of other States.

2. Said defendant was incorporated by the name of Delaware, Lehigh, Schuylkill & Susquehanna Railroad Company on September 20, 1847, under a statute of the Commonwealth of Pennsylvania enacted April 21, 1846 (P. L. 422), entitled "An act to authorize the governor to incorporate the Delaware, Lehigh, Schuylkill and Susquehanna Railroad Company," and by a supplement to the statute aforesaid enacted January 7, 1853 (P. L. 1), the name of this defendant was changed to "Lehigh Valley Railroad Company."

3. Said statute of April 21, 1846, authorized this defendant to construct and maintain a railroad in the Commonwealth of Pennsylvania by certain routes and locations therein specified, and conferred upon the defendant certain powers, privileges, and franchises therein enumerated and expressed. The routes and location of said railroad and the corporate powers, privileges, and franchises of the defendant were thereafter extended and amended by statutes of the Commonwealth of Pennsylvania, supplementary to said act of incorporation, enacted respectively March 20, 1849 (P. L. 203); April 18, 1855 (P. L. 253); March 8, 1856 (P. L. 96); April 16, 1857 (P. L. 209); April 3, 1866 (P. L. 419); and April 2, 1872 (P. L. 739); and this defendant now possesses all the powers, privileges, and franchises conferred by said statutes.

4. On July 8, 1864, under the laws of the Commonwealth of Pennsylvania, in such case made and provided, the Beaver Meadow Railroad and Coal Company was duly consolidated with and merged into this defendant and this defendant thereupon acquired all the property, rights and franchises of said Beaver Meadow Railroad and Coal Company, including the right to mine, transport, and vend coal referred to in the next succeeding paragraph hereof.

23 5. The Beaver Meadow Railroad and Coal Company aforesaid was a corporation of the Commonwealth of Pennsylvania, duly organized under and pursuant to the statute of said Commonwealth enacted April 7, 1830 (P. L. 392), entitled "An act to incorporate the Beaver Meadow Railroad and Coal Company," with certain powers, privileges, and franchises therein specified for the purpose of constructing a railroad and the carrying on of the business of mining, transporting, and vending coal. The routes and location of said railroad and the powers, privileges, and franchises of said corporation were thereafter amended and extended by statutes of said

Commonwealth, supplementary to said act of incorporation, enacted respectively April 4, 1831 (P. L. 494); January 29, 1833 (P. L. 18); April 15, 1835 (P. L. 336); December 22, 1836 (P. L. [1837] 5); February 18, 1848 (P. L. 62); March 20, 1849 (P. L. 185); March 15, 1853 (P. L. 186); and April 15, 1857 (P. L. 189).

6. On August 5, 1864, under the authority of the statutes of the Commonwealth of Pennsylvania, in such case made and provided, the Penn Haven and White Haven Railroad Company was duly consolidated with and merged into this defendant, and this defendant acquired all the property, rights, and franchises of said corporation.

7. The Penn Haven and White Haven Railroad Company aforesaid was a corporation of the Commonwealth of Pennsylvania, duly organized under a statute of said Commonwealth enacted May 4, 1857 (P. L. [1859] 786), entitled "An act to incorporate the Penn Haven and White Haven Railroad Company," with certain powers, privileges, and franchises therein specified for the purpose of constructing a railroad; and the routes and location of said railroad and the powers, privileges, and franchises of said corporation were thereafter extended and amended by statutes of said Commonwealth, supplementary to said act of incorporation, enacted respectively on April 11, 1859 (P. L. 474); April 2, 1860 (P. L. 751); and February 16, 1863 (P. L. 47).

24 8. On June 20, 1866, under the authority of the statutes of the Commonwealth of Pennsylvania, in such case made and provided, the Lehigh and Mahanoy Railroad Company was duly consolidated with and merged into this defendant, and this defendant acquired all the property, rights, and franchises of said corporation.

9. The Lehigh and Mahanoy Railroad Company aforesaid was a corporation of the Commonwealth of Pennsylvania, organized on November 11, 1862, under a statute of said Commonwealth enacted April 8, 1861 (P. L. 259); and upon the organization of said corporation the franchises of the Quakake Railroad Company were transferred and conveyed to it. Said Quakake Railroad Company was a corporation of the Commonwealth of Pennsylvania, organized under a statute of said Commonwealth enacted April 25, 1857 (P. L. 324), entitled "An act to incorporate the Quakake Railroad Company," with certain powers, privileges, and franchises therein specified for the purpose of constructing a railroad; and the routes and location of said railroad were thereafter extended and amended by a statute of said Commonwealth supplementary to said act of incorporation, enacted March 22, 1859 (P. L. 200).

10. On May 25th, 1868, under the authority of the statutes of the Commonwealth of Pennsylvania, in such case made and provided, the Hazleton Railroad Company was consolidated with and merged into this defendant, and this defendant acquired all the property, rights, and franchises of said corporation, including the right to mine, transport, and vend coal referred to in the next succeeding paragraph hereof.

11. The Hazleton Railroad Company aforesaid was a corporation of the Commonwealth of Pennsylvania, originally incorporated under the name of the Hazleton Coal Company, under a statute of said Commonwealth enacted March 18, 1836 (P. L. 129), entitled "An act to incorporate the Hazleton Coal Company," with certain powers,
25 privileges, and franchises therein specified for the purposes of the mining of coal and the transacting of the usual business of companies engaged in the mining, transporting to market, and selling of coal and other products of coal mines, and constructing a railroad from any point on its lands near the headwaters of Cranberry and Hazel creeks to intersect the Beaver Meadow Railroad. The routes and location of the said railroad and the powers, privileges, and franchises of said corporation were thereafter amended and extended by statutes of said Commonwealth, supplementary to said act of incorporation, enacted respectively March 8, 1839 (P. L. 49); April 5, 1849 (P. L. 403); March 18, 1851 (P. L. 190); January 12, 1856 (P. L. 2); March 19, 1863 (P. L. 170); March 9, 1865 (P. L. 299); and March 29, 1867 (P. L. 626). Pursuant to a statute of asid Commonwealth enacted March 9, 1865 (P. L. 299), the name of said corporation was duly changed to the "Hazleton Railroad Company."

12. On June 16, 1868, under the authority of the statutes of the Commonwealth of Pennsylvania, in such case made and provided, the Lehigh Luzerne Railroad Company was duly consolidated with and merged into this defendant and this defendant acquired all the property, rights, and franchises of said corporation.

13. The Lehigh Luzerne Railroad Company aforesaid was a corporation of the Commonwealth of Pennsylvania, duly organized under the name of Jeddo and Carbon County Railroad Company under a statute of said Commonwealth enacted March 23, 1854 (P. L. [1856] 605), entitled "An act to incorporate the Jeddo and Carbon County Railroad Company," with certain powers, privileges, and franchises therein specified for the purpose of constructing a railroad, and the route and location of said railroad and the powers, privileges, and franchises of said corporation were thereafter extended and amended
26 by statutes of the Commonwealth of Pennsylvania, supplementary to said act of incorporation, enacted respectively March 16, 1855 (P. L. 545); February 12, 1856 (P. L. 41); and April 8, 1857 (P. L. 184); and by and pursuant to said supplementary statutes the name of said corporation was changed to "Lehigh Luzerne Railroad Company."

14. Under and pursuant to the statutory authority hereinbefore set forth, various lines of railway were constructed by defendant and its constituent companies aforesaid, and this defendant now owns absolutely and operates, and for many years has held in absolute ownership and operated, lines of railway in the Commonwealth of Pennsylvania, either constructed by itself or acquired from its constituent companies by virtue of the consolidations and mergers hereinbefore specified, to wit, from Phillipsburg, New Jersey, up the valleys of the Lehigh and Susquehanna to Wilkes-Barre, Pennsylvania, with

various branches and divisions traversing the counties of Northampton, Lehigh, Carbon, Luzerne, Schuylkill, Columbia, and Northumberland of said Commonwealth.

15. This defendant has also at various times acquired ownership of the entire capital stock of certain other railroad corporations which are now and long have been operated by the defendant as a part of its railroad system, to wit: (1) Lehigh Valley Railroad Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, and owning a line of railway from Phillipsburg, New Jersey, to Jersey City, New Jersey, with various branches therefrom; (2) Pennsylvania & New York Canal & Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and owning a line of railway from Wilkes-Barre, Pennsylvania, up the valley of the Susquehanna to the boundary line between the State of New York and the Commonwealth of Pennsylvania, with various branches therefrom;

27 (3) Lehigh Valley Railway Company, a corporation organized and existing under the laws of the State of New York, and owning a line of railway connecting with the line of the Pennsylvania & New York Canal & Railroad Company as aforesaid at the boundary line between the State of New York and the Commonwealth of Pennsylvania and running thence to Buffalo, New York, with branches and divisions traversing all the territory of the central portion of the State of New York; (4) Montrose Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and owning a line of railway from Tunkhannock, Pennsylvania, to Montrose, Pennsylvania; (5) Schuylkill & Lehigh Valley Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and owning a line of railway from Lizard Creek Junction, Pennsylvania, to Blackwood, Pennsylvania; (6) Delaware, Susquehanna & Schuylkill Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and owning lines of railway from Drifton to Sheppton and from Oneida to Derringer, Pennsylvania; (7) Easton & Northern Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania and owning lines of railway from Easton to Belfast, Pennsylvania, and Bushkill Station to Thirteenth Street Junction, Easton, Pennsylvania; (8) Loyalsock Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania and owning lines of railway from Port Bowkley to Bernice, Pennsylvania, and branches.

16. This defendant also leases and operates the lines of railway of (1) the State Line & Sullivan Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and owning lines of railway from Monroeton, Pennsylvania, to Bernice, Pennsylvania; and (2) the Lehigh and New York Railroad Company, a corporation organized and exist-

28 ing under the laws of the State of New York, and owning

lines of railway from the Pennsylvania State line, at or near Sayre, Pennsylvania, to North Fair Haven, New York.

17. The railway lines constituting the defendant's railway system as aforesaid aggregate 1,390.75 miles in length, and constitute and are operated as continuous transportation routes between the States of New Jersey, Pennsylvania, and New York. Said lines of this defendant intersect and connect with lines of various other railroad companies and with steamship lines on the Great Lakes and other waterways, and in conjunction with such connecting carriers this defendant transports commodities consigned from and destined to points in many other States and Territories of the United States.

18. By a statute of the Commonwealth of Pennsylvania duly enacted on March 31, 1868 (P. L. 50), entitled "An act to authorize incorporated companies to invest and reinvest surplus funds in mortgages, stocks, and other securities," etc., it was provided that it should be lawful for any and all companies incorporated or organized under the laws of said Commonwealth, including those authorized thereby to transport merchandise or other property, to invest their surplus or other funds or earnings in any good stocks or securities, and to sell and transfer the same and to reinvest the proceeds of such sales in securities or stocks of like kind.

19. By a statute of the Commonwealth of Pennsylvania, duly enacted on the 15th day of April, 1869 (P. L. 31), entitled "An act to authorize railroad and canal companies to aid in the development of the coal, iron, lumber, and other material interests of this Commonwealth," it was provided that it should be lawful for railroad and canal companies to aid corporations authorized by law to develop the coal, iron, lumber, and other material interests of said Commonwealth by the purchase of their capital stock and bonds, or either of them, or by guarantee of or agreement to purchase the principal and interest or either of such bonds.

29 20. This defendant admits that it is now and has been for many years past the owner of shares of the capital stock of the coal companies named in the bill of complaint, and alleges in regard thereto as follows: This defendant now owns the entire capital stock of the Lehigh Valley Coal Company. Said Lehigh Valley Coal Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, formed by the consolidation and merger of the Luzerne Coal & Iron Company and the Green Land Company, and acquired and now owns all the rights, privileges, and franchises of said Luzerne Coal & Iron Company and said Green Land Company. In or prior to 1872 this defendant had acquired the entire capital stock of said Luzerne Coal & Iron Company and of said Green Land Company, and owned the same at the time of said consolidation, and in said consolidation exchanged such holdings for the stock of the Lehigh Valley Coal Company. Thereafter the Mineral Spring Coal Company and the Delano Land Company were consolidated and merged into the Lehigh Valley Coal Company, and the said Lehigh Valley Coal Company acquired all the rights, privileges,

and franchises of said companies. The Green Land Company aforesaid was duly organized and existed as a corporation under and pursuant to a statute of the Commonwealth of Pennsylvania, enacted on the 29th day of May, 1871 (P. L. [1872] 1351), entitled "An act to incorporate the Green Land Company," and a supplement thereto enacted on April 2, 1872 (P. L. 737). The Luzerne Coal & Iron Company aforesaid was duly organized and existed as a corporation under a statute of the Commonwealth of Pennsylvania enacted on April 11, 1868 (P. L. 828), entitled "An act to incorporate the Luzerne Coal and Iron Company." The Delano Land Company aforesaid was duly organized and existed as a corporation under a statute of the Commonwealth of Pennsylvania, enacted on the 15th day of March,
30 1872 (P. L. 388), entitled "An act to incorporate the Delano Land Company," etc. The Mineral Spring Coal Company aforesaid was duly organized and existed as a corporation under a statute of the Commonwealth of Pennsylvania, enacted April 3, 1866 (P. L. [1867] 1400), entitled "An act to incorporate the Mineral Spring Coal Company." This defendant now owns and since the year 1872 has owned the majority and control of the capital stock of the New York & Middle Coal Field Railroad & Coal Company. Said New York & Middle Coal Field Railroad & Coal Company is a corporation originally organized and existing under the laws of the Commonwealth of Pennsylvania, under the name of The Coal Run Improvement Company, under and pursuant to a statute of said Commonwealth enacted on March 11, 1851 (P. L. 143), entitled "An act to incorporate The Coal Run Improvement Company," and supplements to said statute enacted respectively March 2, 1853 (P. L. 136); May 2, 1855 (P. L. 399); April 8, 1864 (P. L. 300); April 17, 1866 (P. L. 1000); February 15, 1872 (P. L. 111); March 7, 1872 (P. L. 250), and reincorporated and since existing under and pursuant to the laws of the Commonwealth. This defendant owns the entire capital stock of Coxe Brothers & Company, Incorporated. Said Coxe Brothers & Company, Incorporated, is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. This defendant owns a minority interest in the capital stock of the Highland Coal Company. Said Highland Coal Company is a corporation organized and existing under a statute of the Commonwealth of Pennsylvania enacted on the 18th day of July, 1863. This defendant now owns and since the year 1869 has owned a majority and control of the capital stock of the Locust Mountain Coal & Iron Company. Said Locust Mountain Coal & Iron Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, originally organized under a stat-
31 ute of said Commonwealth enacted April 5, 1842 (P. L. 240), entitled "An act authorizing Jacob Sorrick and Michael Hetrick, trustees of the Lutheran Congregation of Clover Creek, Huntingdon County, to sell and convey certain real estate and for other purposes," and supplements to said statute enacted respectively March 31, 1853 (P. L. 265); May 3, 1864 (P. L. 710); and April 13, 1868

(P. L. 906). This defendant owns a minority interest in the capital stock of the Packer Coal Company. Said Packer Coal Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. This defendant owns a minority interest in the capital stock of the Temple Iron Company. Said Temple Iron Company is a corporation of the Commonwealth of Pennsylvania, organized in 1873, under a statute of said Commonwealth enacted March 21, 1873 (P. L. 28), and acts supplementary thereto and amendatory thereof.

21. The shares of the capital stock of the aforesaid Lehigh Valley Coal Company, New York & Middle Coal Field Railroad & Coal Company, Coxe Brothers, Incorporated, Highland Coal Company, Locust Mountain Coal & Iron Company, Packer Coal Company and Temple Iron Company, now owned by this defendant, were acquired and are owned and held by it under the authority therefor conferred by the various statutes of the Commonwealth of Pennsylvania hereinbefore mentioned.

22. The aforesaid Lehigh Valley Coal Company, New York & Middle Coal Field Railroad & Coal Company, Coxe Brothers & Company, Incorporated, Highland Coal Company, Locust Mountain Coal & Iron Company, Packer Coal Company and Temple Iron Company, under the authority of their respective charters and the provisions of the several statutes under which they respectively exist, are empowered to mine, ship, and sell coal, and defendant admits that said companies, pursuant to the powers so conferred upon them,
32 have acquired by purchase, lease, or otherwise, coal lands, and coal mines and interests therein in the Commonwealth of Pennsylvania, and that said companies or their lessees are engaged in the mining, production, and sale of anthracite coal within the Commonwealth of Pennsylvania, and shipping such coal by the lines of this defendant from various points within the Commonwealth of Pennsylvania to market in other States for sale therein.

23. This defendant admits that as the owner of the entire capital stock of said Lehigh Valley Coal Company and of said Coxe Brothers & Company, Incorporated, and as the owner of a majority of the capital stock of the New York & Middle Coal Field Railroad & Coal Company, and of the Locust Mountain Coal & Iron Company, it controls and has been controlling the election of the directors or managers of said coal companies, that the coal lands and coal mines of said companies have been continuously since long before the 1st day of May, in the year 1908, and now are operated in the mining of anthracite coal by and under the direct management of the respective presidents and directors of said coal companies, that the person who has been and is the president of each of said coal companies is and for a long time past has been the president of the defendant; that the same persons who are and have been a majority of the directors of each of said coal companies are and for a long time past have been officers or directors of this defendant; that the coal lands and coal mines of the said Highland Coal Company, Packer Coal Company,

and Temple Iron Company have been continuously since long before the 1st day of May, in the year 1908, and now are operated in the mining of anthracite coal under the direct management of their respective boards of directors, and that this defendant is and for a long time past has been represented upon the board of directors of said Highland Coal Company, Packer Coal Company and Temple
33 Iron Company by one or more persons who are also officers or directors of this defendant; and defendant further admits that at the present time and continuously since the 1st day of May, in the year 1908, some of the anthracite coal mined by the aforesaid coal companies or by their lessees has been and is being loaded at or near the mines and lands from which said coal is produced, upon the cars of this defendant, for transportation in interstate commerce, and that a large quantity of such coal has been and is being carried and transported in the cars of this defendant over and upon the railroad of this defendant and its branches, connections, and lines operated as a part of its railway system, through and over the territory of the Commonwealth of Pennsylvania, by continuous carriage, in interstate commerce, across the boundary line of said Commonwealth to and into the States of New York, New Jersey, and other States for sale and delivery at the markets thereof, and that a large quantity of such anthracite coal so transported as aforesaid was not and is not necessary and intended for the use of this defendant in the conduct of its business as a common carrier; and defendant further admits that it is the purpose of this defendant to continue the transportation of said coal as aforesaid.

24. This defendant denies that its ownership in whole or in part of the capital stock of the various coal companies as hereinbefore set forth constitutes the defendant the owner of the coal lands and coal mines and the anthracite coal therein or thereupon and mined or being mined therefrom, or constitutes any interest of this defendant, direct or indirect therein, within the meaning of the 5th paragraph of section 1 of "An act to regulate commerce," approved February 4, 1887, as amended by the act of Congress approved June 29, 1906; and this defendant further denies that the participation of certain persons who are also officers and directors of this defendant in the management of the said coal companies as aforesaid constitutes the operations of
34 said coal companies in the mining and delivering of anthracite coal a mining or production of such anthracite coal by this defendant or under its authority within the meaning of the act of Congress aforesaid.

25. The capital stock of the Lehigh Valley Coal Company and of the New York & Middle Coal Field Railroad & Coal Company owned by this defendant as aforesaid was transferred and assigned to and is now held by the Girard Trust Company as trustee under the general consolidated mortgage executed by this defendant, dated September 30, 1903, for the purposes and upon the terms expressed in said mortgage, a copy of which is hereto annexed marked "Exhibit A," and made a part of this answer. Bonds to the amount of $23,539,000 have

been issued by this defendant under said mortgage and are now outstanding in the hands of the public.

26. The capital stock of Coxe Brothers & Company, Incorporated, owned by this defendant as aforesaid, was transferred and assigned to and is now held by the Girard Trust Company as trustee under the collateral trust agreement executed by this defendant, dated November 1, 1905, for the purposes and upon the terms expressed in said agreement, a copy of which is hereto annexed marked "Exhibit B," and made a part of this answer. Bonds to the amount of $18,000,000 have been issued by this defendant under said agreement and are now outstanding in the hands of the public.

27. The anthracite coal fields of Pennsylvania contain the only large, extensively mined, and commercially valuable deposits of anthracite coal known in the world and are divided geographically into three regions, commonly known respectively as the Wyoming, Lehigh, and Schuylkill regions, all located in the eastern portion of the said Commonwealth. The anthracite coal produced from these coal fields is a commodity of use and necessity as fuel for domestic, manufacturing, and other purposes, the annual consumption of anthracite coal from the said Pennsylvania coal fields being estimated at 12,589,722 tons in the Commonwealth of Pennsylvania and 52,183,601 tons in other States.

28. The gross earnings of this defendant during its last fiscal year were $36,068,431, of which $15,110,899, or nearly 42% of such gross earnings, was derived from the freight rates for the transportation of coal, and $14,996,672 was derived from the freight rates for the transportation of other commodities. During the said period, the coal transported by this defendant represented over 51% of the entire tonnage of freight transported by this defendant. During the said period, the net earnings of this defendant, after the payment of operating expenses, were $13,954,178, and its net income after deducting the expenditures for interest on funded debt and other obligations, rentals, taxes, and improvements was $6,024,953. Of the aforesaid amount of gross earnings derived from the transportation of coal, the greater part thereof was received by this defendant for the transportation of coal for the various coal companies whose stock is in whole or in part owned by defendant as aforesaid. This company transports annually in interstate commerce upwards of 7,600,000 tons of anthracite coal shipped by the said coal companies, whose stock is owned by this defendant in whole or in part, and transports annually for said coal companies wholly within the State of Pennsylvania upwards of 1,500,000 tons. In addition to the portion of the defendant's earnings directly derived from the transportation of coal for said coal companies, a very large part of defendant's earnings is derived from the freight and passenger traffic incidental to and dependent upon the operation of the mines and coll'eries of said coal companies. If this defendant were deprived of the earnings derived from the transportation of the coal of said coal companies its busi-

ness could not be continued except at a net loss of many millions of dollars per annum.

36 29. The railroad lines of this defendant intersect the Wyoming coal region, reach all parts of the Lehigh coal region and extend into the eastern portion of the Schuylkill coal region, and the mines and collieries of the aforesaid coal companies whose stock is owned by this defendant in whole or in part are all located in the portions of said coal fields tributary to the lines of railroad of this defendant. Many of the mines and collieries of the said coal companies are so situated that no means of transporting their product to market exists or can practically be made available, except the railroad lines of this defendant, and many other mines and collieries of said coal companies are so situated that the natural, direct, and more economical route, although not the exclusive route, for the transportation of their product to market, is over the lines of the defendant. The value of the stocks of said companies is dependent upon the right and ability to transport the coal owned or produced by them to the markets in other States, and such stocks would be rendered of little or no value if this defendant should be prohibited from transporting the product of said coal companies in interstate commerce.

30. Throughout the corporate existence of this defendant the transportation of coal from the anthracite coal fields of Pennsylvania has constituted its principal business, and the chief source of its earnings. The railroad lines of this defendant have been from time to time extended, the control of other railroads acquired and its facilities and equipment increased at enormous expense in reliance upon the rights and franchises conferred by the statutes of Pennsylvania as aforesaid, and upon the prospective earnings from the transportation of anthracite coal, and to meet the increasing demands of the markets of the United States for said commodity. The prosperity and existence of this defendant have at all times been dependent upon the transportation of anthracite coal, and its prosperity has increased with the expansion and growth of the anthracite coal trade.

37 31. This defendant has expended large sums of money in extending its lines and constructing branches and sidings to the collieries of said coal companies whose stock is owned by it in whole or in part, and in providing other facilities in order to receive and transport the product of said collieries.

32. The defendant and other railroad corporations whose railroad lines are operated as a part of defendant's railroad system, as aforesaid, respectively own branch lines of railroad of great value, connecting with the main lines of said system and extending from the main lines to collieries owned by the Lehigh Valley Coal Company or others of said coal companies whose capital stock is owned in whole or in part by the defendant. Such branch lines were built only to reach said collieries and to provide the means of transporting the products of said collieries respectively, and are and at all times have been used exclusively for that purpose. They have no other traffic, except such coal traffic and the carriage of supplies to such collieries and small

traffic incidental thereto. Substantially the entire amount of the anthracite coal so transported over said branch lines of railway is destined to markets in States other than the Commonwealth of Pennsylvania, and no accessible and available market within the Commonwealth of Pennsylvania exists therefor. The value of such branch lines of railway depends wholly upon their use in transporting the anthracite coal from the collieries tributary thereto, and there is no value to such branch lines except for that purpose. Defendant specifies the following branch lines as to which the foregoing allegations are true:

(1) The Blackwood Branch of the Schuylkill & Lehigh Valley Railroad Company, from Blackwood Junction, Pennsylvania, to the Blackwood colliery of the Lehigh Valley Coal Company, said branch line being 5.2 miles in length and having a reproduction value of at least $100,000.

(2) Sheppton Branch of the Delaware, Susquehanna &
38 Schuylkill Railroad Company, from Oneida Junction to Sheppton, Pennsylvania, on which are located the Harwood and Oneida collieries controlled by Coxe Brothers & Company, Incorporated, said branch line being 9.7 miles in length and having a reproduction value of at least $125,000.

(3) Derringer Branch of the Delaware, Susquehanna & Schuylkill Railroad Company, from Oneida Junction to Derringer, Pennsylvania, on which is located the Derringer colliery of Coxe Brothers & Company, Incorporated, said branch line being 13.4 miles in length and having a reproduction value of at least $400,000.

(4) Primrose Branch of this defendant to the Primrose colliery of the Lehigh Valley Coal Company, said branch line being 3 miles in length and having a reproduction value of at least $90,000.

(5) There are many other branch lines of great value as to which the foregoing allegations of this paragraph are true.

33. The capital stock of this defendant issued and outstanding amounts to $40,441,100, consisting of 808,822 shares of the par value of $50 each, and said shares are distributed among and held by 5,370 stockholders, of whom 2,732 own less than 25 shares each.

34. The transportation of anthracite coal over the lines of this defendant in interstate commerce, which is charged in the bill of complaint to be unlawful, amounts to a daily average of at least 1,200 cars.

35. This defendant is informed and believes and therefore alleges that there are railroad corporations other than this defendant which transport from one State or Territory to another State or Territory timber and the manufactured products thereof produced or manufactured by such railroad corporations, or under their authority, or
which such railroad corporations own or are interested in,
39 other than timber and the manufactured products thereof which are necessary and intended for the use of such railroad corporations in the conduct of their business as common carriers.

36. This defendant further states and avers that its only relation to the said anthracite coal produced from the mines of said several coal companies whose stock is owned by defendant in whole or in part and transported by this defendant (apart from its obligation and duty as a railroad common carrier in the transportation thereof) is incidental to and arises from its ownership to the extent hereinbefore stated of shares of the capital stock of said coal companies, and this defendant is advised by counsel and verily believes and so avers that its ownership of shares of the capital stock of said coal companies, which it had lawfully acquired and owned for a long period prior to the enactment of the said act of Congress approved June 29, 1906, and the participation of some persons who are also its officers in the management of said coal companies, do not constitute this defendant a miner or producer of the anthracite coal produced from the mines of said coal companies, or as authorizing such production; or invest this defendant with any ownership of or any interest, direct or indirect, in said coal within the purview, meaning, and intent of the fifth paragraph of section 1 of "An act to regulate commerce," approved Feb. 4, 1887, as amended by the act of Congress approved June 29, 1906.

37. Defendant avers that if the ownership of the stocks of the coal companies aforesaid could rightfully be held to create ownership of, or interest in, the anthracite coal transported by defendant for such corporations, within the meaning of the act of Congress aforesaid, said statute would have the effect of destroying and rendering wholly valueless property lawfully acquired and owned by this defendant, and would amount to a taking of its property without due process of law and without compensation and to an arbitrary deprivation of the liberty of the defendant, in contravention of the fifth amendment to the Constitution of the United States.

38. Defendant further avers that the said act of Congress is in effect a prohibiton of interstate commerce in a useful and necessary commodity and not a regulation of commerce, and that its enactment was not within the scope and power of Congress under the third clause of section 8, Article I, of the Constitution of the United States, and that such prohibition is not an appropriate means or a means consistent with the letter and spirit of the Constitution for the accomplishment of any purpose within the scope of said third clause of section 8, Article I, of the Constitution.

39. Defendant further avers that said act of Congress, if construed as prohibiting the transportation of authracite coal owned by the Lehigh Valley Coal Company, the New York & Middle Coal Field Railroad & Coal Company, and Coxe Brothers & Company, Incorporated, would have the direct and necessary operation and effect of impairing the obligations of the contracts between this defendant and its bondholders expressed in its general consolidated mortgage and collateral trust agreement hereto annexed, in contravention of the Constitution of the United States.

40. Defendant further avers that the act of Congress aforesaid is in contravention of the provisions of the eighth amendment to the Constitution of the United States, in that it operates to impose and inflict excessive fines and cruel and unusual punishment within the meaning of said constitutional amendment.

Wherefore, this defendant, having fully answered, confessed, traversed, and avoided all the matters in said bill of complaint material to be answered, according to its best knowledge and belief, humbly prays this honorable court to enter its decree that this defendant be hence dismissed, and for such further and other relief in the
41 premises as to this honorable court may seem meet and in accordance with equity.

J. F. SCHAPERKOTTER,
General Solicitor for Lehigh Valley Railroad Company,
143 Liberty street, New York City, N. Y.

FRANK H. PLATT,
Of Counsel.

SOUTHERN DISTRICT OF NEW YORK, ss:

Eben B. Thomas, being duly sworn, deposes and says that he is the president of the Lehigh Valley Railroad Company, the defendant herein; that he has read the foregoing answer of said defendant and that the same is true to the best of his knowledge, information, and belief.

E. B. THOMAS.

Sworn to before me this 11th day of June, 1908.

F. T. HARBACH,
Notary Public, New York Co.

43 EXHIBIT A.

General consolidated mortgage.

This indenture, made the thirtieth day of September, in the year one thousand nine hundred and three, between

Lehigh Valley Railroad Company, a corporation created by and existing under the laws of the State of Pennsylvania (hereinafter called the "Railroad Company"), party of the first part, and Girard Trust Company, a corporation created by and existing under the laws of the State of Pennsylvania (hereinafter called the "Trustee"), party of the second part.

Whereas, at a meeting of the board of directors of the railroad company, duly called and held at its office in the city of Philadelphia on the thirtieth day of September, in the year nineteen hundred and three, the draft of a mortgage or deed of trust in the form of this indenture was submitted and read, and resolutions in the following words were duly and unanimously adopted, viz:

Resolved, That the president or vice-president and the secretary of the company be, and they are hereby, authorized and directed, in its

behalf and under its corporate seal, and in form substantially that now submitted to this board, to execute and deliver a mortgage or deed of trust upon the property and franchises of the corporation, to be known as the "General Consolidated Mortgage," to Girard Trust Company, as trustee, to secure an issue of bonds for an aggregate principal sum not exceeding $150,000,000, the principal of such bonds to be payable in gold coin of the United States of the
44 present standards of weight and of fineness, on the first day of May, in the year 2003, at the office or agency of the railroad company in the city of Philadelphia or in the city of New York, as shall be determined by the board of directors from time to time as such bonds shall be issued, with interest thereon at such rate per annum, not exceeding five per cent, as shall from time to time be determined by the board of directors when such issues of such bonds shall be made; interest to be payable semiannually at said office or agency, in like gold coin, on the first days of May and November in each year, such bonds to be issued and disposed of on the conditions, for the purposes, and in the manner set forth in said form of mortgage.

And whereas the bonds to be secured by this indenture are to be executed in the name and on behalf of the said company and under its corporate seal by its president, or any vice-president, and its secretary or assistant secretary, as and when called for by resolution of the board of directors of the railroad company, under the terms of this indenture, and are to be for such denomination or par value, at such rate of interest, and in such form consistent with the terms of this indenture as at the time of issue said board shall prescribe, the $20,000,000 of said bonds which, as hereinafter provided, may be forthwith issued, to be coupon bonds of the denomination of $1,000, numbered consecutively from 1 upwards, and registered bonds of the denominations of $1,000, $5,000, and $10,000, numbered consecutively from A 1 upwards for $1,000 bonds, B 1 upwards for $5,000 bonds, and C 1 upwards for $10,000 bonds, and to be substantially in the following tenor, unless at the time of issue the board of directors shall prescribe some other denomination and form consistent with the terms of this indenture.

45 (Form of coupon bond.)

No. . $1,000.

United States of America, State of Pennsylvania.

Lehigh Valley Railroad Company. General consolidated mortgage gold bond. Total issue, $150,000,000.

Coupon bond.

Know all men by these presents, that Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, hereinafter called the "Railroad company," for value received, promises to pay to the bearer or, if registered, to the registered holder, of this bond, one

thousand dollars, gold coin of the United States of America, on the first day of May, in the year 2003, at the office or agency of the railroad company, in the city of Philadelphia, and to pay interest thereon, from November 1st, 1903, at the rate of per cent per annum, payable semiannually, in like gold coin, at said office or agency, on the first days of May and November in each year, but only upon presentation and surrender of the annexed coupons as they severally mature, such United States gold coin in every case to be of the standard of weight and fineness as it existed July 1st, 1903.

Both the principal and interest of this bond are payable without deduction for any tax or taxes of the United States, or of any State, county, or municipality thereof, which the railroad company may be required to pay, or to retain therefrom, under any present or future law.

This bond is one of a series of coupon and registered bonds of the railroad company known as "General consolidated mortgage gold bonds," duly authorized and approved by the board of directors of the railroad company, and issued and to be issued, to an amount not exceeding in the aggregate $150,000,000 at any one time outstanding; all of which bonds are issued under, and in pursuance of, and are equally secured by, a mortgage or deed of trust dated September 30th, 1903, executed by the railroad company to Girard Trust Com-
46 pany, a corporation of the State of Pennsylvania, as trustee, of all the property and franchises of the railroad company mentioned in said mortgage or deed of trust, to which reference is hereby made for a description of the property and franchises mortgaged and the nature and extent of the security, and the rights of the holders of said bonds, under the same, and the terms and conditions upon which said bonds are issued and secured.

This bond may be registered as to principal in the owner's name on the books of the railroad company at the office or agency of the railroad company in the city of Philadelphia, such registry being noted on the bond by the railroad company's transfer agent, after which no transfer shall be valid unless made on the railroad company's books by the registered owner in person or by attorney duly authorized and similarly noted on the bond; but the same may be discharged from registry by being transferred to bearer, after which transferability by delivery shall be restored; but it may again, from time to time, be registered or transferred to bearer as before; such registration, however, shall not affect the negotiability of the coupons by delivery merely. This bond is also exchangeable for registered bonds without coupons, as provided in said mortgage or deed of trust, on payment, if the railroad company shall so require, of the charge therein provided for.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon endorsed, of the trustee under said mortgage or deed of trust.

In witness whereof, Lehigh Valley Railroad Company has caused these presents to be signed by its president or by its vice-president,

and its corporate seal to be hereunto affixed and attested by its secretary or its assistant secretary, and coupons for said interest, with the engraved signature of its treasurer, to be attested hereunto this thirtieth day of September, 1903.

LEHIGH VALLEY RAILROAD COMPANY,
By , *Vice-President.*

Attest:

. *Secretary.*

47 (Form of registered bond.)

No. A . $———.

United States of America. State of Pennsylvania.

Lehigh Valley Railroad Company. General consolidated mortgage gold bond. Total issue, $150,000,000.

Registered bond.

Know all men by these presents, that Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, hereinafter called the "Railroad company," for value received, promises to pay or assigns, thousand dollars, gold coin of the United States of America, on the first day of May, in the year 2003, at the office or agency of the railroad company in the city of Philadelphia, and to pay interest thereon from the first day of May or November, as the case may be, next preceding the date of issue hereof, at the rate of per cent per annum, payable semiannually, in like gold coin, at said office or agency, on the first days of May and November in each year, such United States gold coin in every case to be of the standard of weight and fineness as it existed July 1st, 1903.

Both the principal and interest of this bond are payable without deduction for any tax or taxes of the United States or of any State, county, or municipality thereof, which the railroad company may be required to pay, or to retain therefrom, under any present or future law.

This bond is one of a series of coupon and registered bonds of the railroad company, known as "General consolidated mortgage gold bonds," duly authorized and approved by the board of directors of the railroad company, and issued and to be issued, to an amount not exceeding in the aggregate $150,000,000 at any one time outstanding; all of which bonds are issued under and in pursuance of, and are equally secured by, a mortgage or deed of trust, dated Sep-
48 tember 30th, 1903, executed by the railroad company to Girard Trust Company, a corporation of the State of Pennsylvania, as trustee, of all the property and franchises of the railroad company mentioned in said mortgage or deed of trust, to which reference is hereby made for a description of the property and franchises mort-

gaged, and the nature and extent of the security, and the rights of the holders of said bonds, under the same, and the terms and conditions upon which said bonds are issued and secured.

This bond is transferable by the registered holder hereof, in person or by attorney duly authorized, on the books of the railroad company at the office or agency of the railroad company in the city of Philadelphia upon surrender and cancellation of this bond, and a new registered bond will be issued to the transferee in exchange therefor, as provided in said mortgage or deed of trust, and on payment, if the railroad company shall so require, of the charge therein provided for.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon endorsed, of the trustee under said mortgage or deed of trust.

In witness whereof, Lehigh Valley Railroad Company has caused these presents to be signed by its president or by its vice-president, and its corporate seal to be hereunto affixed and attested by its secretary or its assistant secretary this day of .

LEHIGH VALLEY RAILROAD COMPANY,

By , *Vice-President.*

Attest:

, *Secretary.*

And whereas, there are to be annexed to the said coupon bonds, at the time of the issue thereof, coupons representing the semiannual interest installments which may become due thereon to and including the first day of May, 2003, each of which coupons is to be substantially of the following tenor:

49 (Form of interest coupon.)

No. . $.

On the first day of Lehigh Valley Railroad Company will pay to bearer at its office or agency in the city of Philadelphia, dollars gold coin, without deduction for taxes, being six months' interest then due on its general consolidated mortgage gold bond No. .

Treasurer.

And whereas the coupons to be attached to said coupon bonds are to be authenticated by the engraved signature of the present treasurer or of any future treasurer of the company, it being intended that the company may adopt and use for that purpose the engraved signature of any person who shall have been its treasurer, at or subsequent to the date of these presents, notwithstanding the fact that he may have ceased to be such treasurer at the time when such bonds shall be actually certified and delivered;

And whereas there is to be endorsed on each of such bonds a certificate of the trustee that it is one of the general consolidated mortgage gold bonds herein described, and no bond will be valid or oblig-

atory for any purpose until such certificate shall have been executed by the trustee, such certificate to be substantially of the following tenor, viz:

(Form of trustee's certificate.)

This bond is one of the series of general consolidated mortgage gold bonds referred to in the within-mentioned mortgage executed by Lehigh Valley Railroad Company to the undersigned.

GIRARD TRUST COMPANY, *Trustee.*
By , *Vice-President.*

50 Now, therefore, this indenture witnesseth: That in order to secure the payment of the principal and interest of all such bonds at any time issued and outstanding under this indenture, according to their tenor and effect, and the performance of all the covenants and conditions herein contained, and to declare the terms and conditions upon which such bonds are issued and received, and in consideration of the premises and of the purchase and acceptance of such bonds by the holders thereof, and of the sum of one dollar to the railroad company duly paid by the trustee at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged:

Lehigh Valley Railroad Company, party of the first part, has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred, and set over, and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer, and set over unto the trustee, party of the second part, its successors and assigns forever:

All and singular the following estates, railroads, lands, properties, rights, privileges, and franchises, and shares of capital stock, viz:

First. The main line of railroad of said Lehigh Valley Railroad Company, extending from Phillipsburg, in the State of New Jersey, on the eastern bank of the river Delaware, opposite the city of Easton, in the county of Northampton, in the State of Pennsylvania, to Wilkesbarre, in the county of Luzerne, in the said State of Pennsylvania; also the following branches, all in the said State of Pennsylvania; the Barber's Quarry Branch, West End Branch, and Jordan Loop, at Allentown, Lehigh County; the Egypt Branch, at Coplay, Lehigh County; the Slatedale Branch, extending from Slatington, Lehigh County, to Seagersville Quarry, Lehigh County; the
51 Welshtown Creek Branch, at Slatington, Lehigh County; the Mahoning Creek Branch, at Lehighton, Carbon County; the Silk Mill Banch, at Mauch Chunk, Carbon County; the Beaver Meadow Branch extending from Penn Haven Junction on said main line, in the county of Carbon to Audenried, in said county of Carbon; the Lehigh and Mahanoy Branch, extending from Black Creek Junction, on the said Beaver Meadow Branch, in said county of Carbon, to Mount Carmel, in the county of Northumberland; the Ashland Branch, extending from Kohinoor Junction to Ashland in the county

of Schuylkill; the Hazleton Branch, extending from Hazle Creek Junction on the said Beaver Meadow Branch, in the county of Carbon, through Hazleton, to Tomhicken, in the county of Luzerne; the Delano and Hazleton Branch, extending from Hazleton Junction, on the said Hazleton Branch, in said Luzerne County, to New Boston Junction, in the county of Schuylkill; the Lehigh Luzerne Branch, extending from Hazleton Branch at Lumber Yard, in the county of Luzerne, to Harleigh Junction, on the said Hazleton Branch, and to Milnesville, in the county of Luzerne; the Highland Branch, extending from Pink Ash Junction, on the Lehigh Luzerne Branch, in the county of Luzerne, to Sandy Run Junction in the same county; the Bear Creek Branch, extending from Bear Creek Junction in the county of Luzerne, to Beaupland in the same county; the Mountain Cut Off, from Fairview, in the county of Luzerne, to Avoca, in the same county; said railroads, with their branches, turnouts, and sidings, amounting in the aggregate to 798.75* miles of single-track railroad; together with all other branches of the said railroads, and each of them, now belonging to, or which may hereafter be constructed by or belong to the said party of the first part, in the said State of Pennsylvania;

52 Including any and all roadbed, superstructure, rights of way, rails, tracks, side tracks, bridges, viaducts, buildings, depots, stations, warehouses, car houses, engine houses, freight houses, coaling stations, machine shops, and other shops, turntables, water stations, fences, docks, structures, erections, and fixtures, and all other things of whatever kind in any wise or now or hereafter belonging or appertaining to any line of railway, or to any branch or extension, at any time subject to the lien of this indenture, or provided for use thereon, or in connection therewith; and any and all lands now or hereafter designed for depots, warehouses, or other structures at any terminus, or on and along such lines of railway, or upon or along any such branch or extension; and any and all locomotives, engines, cars, and other rolling stock equipment, machinery, instruments, tools, implements, materials, and furniture now owned or hereafter acquired by the railroad company, and other chattels, wheresoever situated, now or hereafter held, acquired, or provided for use upon such lines of railway or branches or extensions, or upon any other line or branch or extension, or upon any operated line; and any and all leases, under which it now operates or may hereafter operate any railroads, and any and all other property, real or personal, of every kind and description, now or hereafter acquired for use upon, or in connection with, or for the purpose of, any lines of railway, branches, or extensions now or hereafter subject to the lien hereof; and any and all corporate or other rights, privileges, and franchises which the railroad company now has, or hereafter shall acquire, possess, or exercise for, or appertaining to, the construction, maintenance, use, or opera-

*The additional mileage of the lines of railroad whose capital stocks are pledged hereunder under Subdivisions I and II of section third of the granting clauses hereof is 761.46 miles.

tion of such lines or railway or branches or extensions, or any part thereof; and any and all the rents, issues, profits, tolls, and other income of such lines of railway, or branches or extensions, or any part thereof; and any and all the rights, privileges, franchises, properties, real or personal, rights and things which the railroad
53 company may or shall hereafter possess, or become entitled to possess, for the purpose of, or in connection with, the operation of such lines of railway or any such branch or extension.

The leases now existing and referred to above, are:

Pennsylvania and New York Canal and Railroad Company to Lehigh Valley Railroad Company, dated Dec. 1, 1888.

The Lehigh Valley Rail Way Company to Lehigh Valley Railroad Company, dated April 14, 1891.

Lehigh and New York Railroad Company to Lehigh Valley Railroad Company, dated Aug. 24, 1895.

Second. All and singular the following estates, lands, wharves, and properties:

1. All that certain lot or piece of ground with the building thereon erected, situate on the west side of Third street (enlarged by a strip of ground ten feet in width thrown out for public use to widen the footway) and on the south side of Willing's alley, as at present laid out and opened, eighteen feet in width between Walnut and Spruce streets, in the city of Philadelphia, State of Pennsylvania, containing in front or breadth on Third street forty-two feet three inches, and extending of that width westward one hundred and seventy-eight feet six inches on the north line thereof, and one hundred and seventy-eight feet ten and one-fourth inches on the south line thereof, to the easternmost line of a private passageway or court.

Together with the free use, right, and privilege of the said passageway and water course.

(Being the same premises which the Pennsylvania Railroad Company, et al., by deed bearing date the tenth day of May, A. D. 1872, and recorded in the office for recording of deeds in and for the city and county of Philadelphia, in Deed Book F. T. W. No. 10, page 44, etc., granted and conveyed unto the Lehigh Valley Railroad Company, its successors and assigns.)

54 2. All that certain lot or piece of ground with the building thereon erected, situate on the west side of Third street (enlarged by a strip of ground ten feet in width thrown out for public use to widen the footway by Thomas Willing, Benjamin Chew, and others, by indenture of five parts, dated the twentieth day of December, A. D. 1809), between Spruce street and Willing's alley in the city of Philadelphia. Beginning at a point on the west side of Third street, enlarged, as aforesaid, at the distance of forty-two feet three inches southward from the south side of Willing's alley aforesaid, containing in breadth, north and south, twenty feet six and a half inches, and in length or depth east and west one hundred and fifty-one feet ten and three-fourths inches on the north line, and one hundred and fifty-two feet on the south line thereof.

(Being the same premises which the Pennsylvania Railroad Company, et al., by deed bearing date the tenth day of May, A. D. 1872, and recorded in the office for the recording of deeds, in and for the city and county of Philadelphia, in Deed F. T. W., No. 10, page 49, etc., granted and conveyed unto the Lehigh Valley Railroad Company, its successors and assigns.)

Together with all the rights and privileges mentioned and expressed in the above-mentioned indenture of five parts, which shall, or of right, ought to attach to the owners and occupiers of the said premises.

3. All those two certain lots or pieces of ground with the buildings and improvements thereon erected, situate in the sixth ward of the city of Philadelphia, described according to a survey thereof made by W. C. Cranmer, surveyor and regulator of the third district, on the eighth day of September, A. D. 1890, as follows, to wit:

One thereof, beginning at a point on the west side of Delaware avenue at a distance of two hundred and six and fifty-six one hundredths feet northward from the north side of Arch street; thence extending northward along the west side of said Delaware avenue sixty-four feet to a point on the south side of a certain ten-feet wide alley; thence extending westward along the south side of said alley one hundred and thirty-seven and ninety-two one-hundredths feet to a point on the east side of Water street; thence extending
55 southward along said side of Water street fifty-three and eighty-five one-hundredths feet to a point; thence extending eastward ninety-one and fifty-eight one hundredths feet to a point; thence extending southward twelve and fifty-four one-hundredths feet to a point; thence extending eastward forty-six and forty-two one-hundredths feet to the first-mentioned point and place of beginning.

And the other thereof, beginning at a point on the east side of said Delaware avenue at a distance of one hundred and seventy-six and forty-eight one-hundredths feet northward from the north side of Arch street; thence extending northward along the said side of Delaware avenue ninety-three and twenty-seven one-hundredths feet to a point in the south line of a certain ten-feet wide alley; thence extending eastward along the south side of said alley two hundred and seventy-five and fifteen one-hundredths feet to the port warden's line in the river Delaware; thence extending southward along the said port warden's line eighty-nine and four hundred and twenty-six one-thousandths feet; thence extending westward two hundred and seventy-six and eighty-four one-hundredths feet to the first mentioned point and place of beginning.

Excepting therefrom the following described tract:

Beginning at a point on the east side of Delaware avenue at its intersection with the southerly line of lands of the Lehigh Valley Railroad Company; thence westward along the southerly line of lands of the Lehigh Valley Railroad Company 118 feet 5/8 inches more or less to a point in the former easterly side of Delaware avenue distant 176.48 feet northward measured along said former easterly

line of Delaware avenue from the northerly line of Arch street; thence northward along the former easterly line of Delaware avenue 93.27 feet; thence eastward 118 feet more or less to the eastward side of Delaware avenue; thence southward along said easterly side of Delaware avenue 92 feet more or less to the place of beginning. Being a part of the tract of land which was dedicated by the Lehigh Valley Railroad Company to the city of Philadelphia, December 22, 1897, for the widening of Delaware avenue.

4. All that certain lot or piece of ground, with the buildings, wharves, and improvements thereon erected, situate in the
56 sixth ward of the said city of Philadelphia, described according to a survey thereof made by W. C. Cranmer, surveyor and regulator of the third district, on the eighth day of September, A. D. 1890, as follows, to wit:

Beginning at a point on the east side of Delaware avenue at the distance of one hundred and fifty-one and ninety-four one-hundredths feet southward from the south side of Race street; thence extending southward along the said side of Delaware avenue one-hundred and eighty-two and twenty-nine one-hundredths feet to a point on the north side of a certain ten feet wide alley; thence extending eastward along the north side of said alley two hundred and seventy-five and five one-hundredths feet to the port warden's line in the river Delaware; thence extending northward along the said port warden's line one hundred and eighty-three and fifty-six one-hundredths feet; thence extending westward two hundred and seventy-four and sixty-one one-hundredths feet to the first mentioned point and place of beginning.

Excepting therefrom the following described tract: Beginning at a point in the east side of Delaware avenue at its intersection with the northerly line of lands of the Lehigh Valley Railroad Company; thence westward along the northerly line of lands of the Lehigh Valley Railroad Company 117 feet 5/8 inches more or less to a point in the former east side of Delaware avenue distant 151.94 feet southward measured along the said former easterly side of Delaware avenue from the southerly side of Race street; thence southward along said former easterly line of Delaware avenue 182.29 feet; thence eastward 117 feet more or less to the easterly side of Delaware avenue; thence northward along the said easterly side of Delaware avenue 181 feet more or less to the place of beginning. Being a part of the tract of land which was dedicated by the Lehigh Valley Railroad Company to the city of Philadelphia, December 22, 1897, for the widening of Delaware avenue.

Under and subject to a certain mortgage debt of one hundred and fifty thousand dollars ($150,000), secured upon the premises by indenture of mortgage given and executed by Charles Hartshorne to Alexander Kerr, dated October 9th, 1890, and recorded at Philadelphia, in Mortgage Book G. G. P. No. 636, page 326, &c., together with the interest due and to become due thereon.

57 Also, all the right, title and interest of the said Lehigh Valley Railroad Company in and to said ten feet wide alley above mentioned and extending from the easterly side of Delaware avenue to the port warden's line in the Delaware River, which said alley was, by ordinance of the select and common councils of the city of Philadelphia, approved the twenty-first day of September, A. D. 1896, stricken from the city plan.

5. All that certain lot or piece of ground, with the buildings and improvements thereon erected, situate in the sixth ward of the city of Philadelphia, in the State aforesaid, described according to a survey thereof made by W. C. Cranmer, surveyor and regulator of the third district, on the twelfth day of March, A. D. 1892, as follows, viz:

Beginning at a point on the west side of Delaware avenue at the distance of one hundred and sixty-two feet eight and three-quarter inches northward from the north side of Arch street (which said point is also in the middle of a certain alley eight feet eight inches front on the said Delaware avenue, which extends westward increasing in width to the east side of Water street on which it contains nine feet four inches); thence extending westward along the centre line of said alley one hundred and thirty-eight feet two and five-eighths inches to a point on the east side of Water street at a distance of one hundred and sixty-three feet five and three-quarter inches northward from the north side of Arch street aforesaid, thence northward along the east side of said Water street fifty-five feet nine and three-quarter inches to a point, thence eastward ninety-one feet seven inches to a point, thence southward twelve feet six and one-half inches to a point; thence further eastward forty-six feet five inches to a point on the west side of said Delaware avenue, thence southward along the said side of Delaware avenue forty-three feet ten inches to the first-mentioned point and place of beginning.

Together with the free and common use, right, liberty, and privilege of the said alley as and for a passageway and water course at all times hereafter forever in common with the owners, tenants, and occupiers of the other lots of ground bounding thereon.

58 Under and subject to a certain mortgage debt of twenty thousand dollars ($20,000) secured upon the premises by indenture of mortgage given and executed by Charles Hartshorne to the Pennsylvania Company for Insurances on Lives and Granting Annuities, trustee, dated April 4th, 1892, and recorded at Philadelphia, in mortgage book T. G. No. 147, page 349, etc., together with the interest due and to become due thereon.

(Being the same premises [as to above tracts 3, 4, and 5] which Charles Hartshorne, by deed dated the thirtieth day of April, A. D. 1897, and recorded in the office for recording of deeds in and for the city and county of Philadelphia in deed book W. M. G. No. 194, page 83, etc., granted and conveyed [subject as aforesaid] unto the Lehigh Valley Railroad Company, its successors and assigns.)

6. The rights, interests, equities, claims, and demands as particularly set forth in certain declarations of trusts made, executed, and delivered to the trustee herein for the benefit of the holders of the bonds secured hereby, to wit:

(a) Declaration of trust, United Real Estate Company to the Girard Trust Company, of Philadelphia, and the Lehigh Valley Railroad Company, dated the 14th day of July, A. D. 1903, as to certain real estate in Jersey City, N. Y., containing 8 1/3 acres, more or less, known as the Kellogg lots, conveyed to the United Real Estate Company by Charles Hartshorne by deed dated April 23, 1898, and recorded in book 699 of Deeds, page 405, &c., in the office of the register of deeds of Hudson County, N. J.

(b) Declaration of trust, United Real Estate Company to the Girard Trust Company, of Philadelphia, and the Lehigh Valley Railroad Company, dated the 14th day of July, A. D. 1903, as to certain real estate in Jersey City, containing 4.7 acres, more or less, known as the Edge lots, conveyed to the United Real Estate Company by two deeds, one from Charles L. Carrick, special master in chancery, and the other from Benjamin Edge, each dated June 5, 1900, and recorded in Book 753 of Deeds, page 299, &c., and page 288, &c., respectively, in the office of the register of deeds of Hudson County, N. J.

59 (c) Declaration of trust, United Real Estate Company to the Girard Trust Company, of Philadelphia, and the Lehigh Valley Railroad Company, dated 14th day of July, A. D. 1903, as to certain real estate in the city of Bayonne, N. J., containing 127.63 acres, known as the Constable Hook property; conveyed to the United Real Estate Company by Elisha P. Wilbur and wife by deed dated April 28, 1898, and recorded in Book 699 of Deeds, page 408, &c., in the office of the register of deeds of Hudson County, N. J.

(d) Declaration of trust, United Real Estate Company to the Girard Trust Company, of Philadelphia, and the Lehigh Valley Railroad Company, dated 14th day of July, A. D. 1903, as to certain real estate in the city of Newark, containing 199 acres more or less, known as the Newark Meadow property; conveyed to the United Real Estate Company by sundry deeds, containing full description of same, as follows:

(1) L. D. H. Gilmour et ux to the United Real Estate Company, dated October 12, 1899, and recorded in the office of the register of Essex County, N. J., in Book T 32 of Deeds, page 550–552.

(2) Clarence T. Platt et ux to the United Real Estate Company, dated October 14, 1899, and recorded in aforesaid office in Book Q 32, page 589–590.

(3) Clarence T. Platt et ux to the United Real Estate Company, dated June 2, 1899, and recorded in said office in Book T 32, page 552–554.

(4) L. D. H. Gilmour et ux to the United Real Estate Company, dated April 27, 1899, and recorded in said office in Book T 32, page 532–535.

(5) L. D. H. Gilmour et ux to the United Real Estate Company, dated April 29, 1899, and recorded in said office in Book T 32, page 547–550.

(6) L. D. H. Gilmour et ux to the United Real Estate Company, dated July 30, 1900, and recorded in said office in Book O 33, page 385–386.

60 (7) L. D. H. Gilmour et ux to the United Real Estate Company, dated November 14, 1899, and recorded in said office in Book U 32, page 187–188.

(8) L. D. H. Gilmour et ux to the United Real Estate Company, dated May 29, 1899, and recorded in said office in Book Q 32, page 593–594.

(9) L. D. H. Gilmour et ux to the United Real Estate Company, dated June 9, 1899, and recorded in said office in Book T 32, page 545–547.

(10) John B. Stetson et ux to the United Real Estate Company, dated May 6, 1899, and recorded in said office in Book Q 32, page 592–593.

in Book T 32, page 540–542.

(12) L. D. H. Gilmour et ux to the United Real Estate Company, dated April 27, 1899, and recorded in said office in Book Q 32, page 595–596.

(13) William W. Winner to the United Real Estate Company, dated May 4, 1899, and recorded in said office in Book Q 32, page 590–591.

(14) L. D. H. Gilmour et ux to the United Real Estate Company, dated August 2, 1899, and recorded in said office in Book Q 32, page 596–597.

in Book T 32, page 543–545.

(16) L. D. H. Gilmour et ux to the United Real Estate Company, dated October 12, 1899, and recorded in said office in Book U 32, page 1–2.

(15) L. D. H. Gilmour et ux to the United Real Estate Company, dated May 4, 1899, and recorded in said office

(17) L. D. H. Gilmour et ux to the United Real Estate Company, dated April 21, 1899, and recorded in said office

Company, dated July 28, 1899, and recorded in said office

(11) L. D. H. Gilmour et ux to the United Real Estate

in Book T 32, page 537–540.

61 Company, dated June 1, 1899, and recorded in said office in Book Q 32, page 598–599.

(19) L. D. H. Gilmour et ux to the United Real Estate Company, dated May 11, 1899, and recorded in said office in Book Q 32, page 599–600.

(20) L. D. H. Gilmour et ux to the United Real Estate Company, dated April 29, 1899, and recorded in said office in Book T 32, page 535–537.

(21) L. D. H. Gilmour et ux to the United Real Estate Company, dated April 21, 1899, and recorded in said office in Book U 32, page 2–3.

(22) L. D. H. Gilmour et ux to the United Real Estate Company, dated April 29, 1899, and recorded in said office in Book U 32, page 4–5.

(23) L. D. H. Gilmour et ux to the United Real Estate Company, dated October 20, 1899, and recorded in said office in Book U 32, page 5–6.

(24) Ada McGregor Clark and husband to the United Real Estate Company, dated May 26, 1900, and recorded in said office in Book M 33, page 87–90.

(25) William P. Coe et ux to the United Real Estate Company, dated April 12, 1900, and recorded in said office in Book F 33, page 320–322.

(26) M. A. Pierson et als., executors, to the United Real Estate Company, dated April 12, 1900, and recorded in said office in Book F 33, page 318–320.

(27) H. F. Osborne et als., to the United Real Estate Company, dated April 12, 1900, and recorded in said office in Book F 33, page 315–317.

(28) L. D. H. Gilmour et ux to the United Real Estate Company, dated August 9, 1900, and recorded in said office in Book O 33, page 455–456.

(29) L. D. H. Gilmour et ux to the United Real Estate Company, dated February 21, 1900, and recorded in said office in Book F 33, page 7–9.

62 (30) L. D. H. Gilmour et ux to the United Real Estate Company, dated February 21, 1900, and recorded in said office in Book D 33, page 278–279.

(31) L. D. H. Gilmour et ux to the United Real Estate Company, dated February 21, 1900, and recorded in said office in Book F 33, page 9–11.

(32) L. D. H. Gilmour et ux to the United Real Estate Company, dated May 21, 1900, and recorded in said office in Book F 33, page 560–562.

(33) M. P. Guerin et al., executors, to the United Real Estate Company, dated February 20, 1900, and recorded in said office in Book G 33, page 79–81.

(34) E. R. McGregor and husband to the United Real Estate Company, dated February 27, 1900, and recorded in said office in Book G 33, page 77–79.

(35) George W. Weidenmayer et ux to the United Real Estate Company, dated November 3, 1899, and recorded in said office in Book V 32, page 495–497. Excepting therefrom all that portion of the tract conveyed which lies south of the southerly side of Murray street, being land included within the right of way lines of the Lehigh Valley Terminal Railway and also land which was conveyed by the

United Real Estate Company to the New York Bay Railroad Company, by deed dated May 23d, 1900.

(36) Robert H. Sayre et ux to the United Real Estate Company, dated November 30, 1897, and recorded in the said office in Book F 31, page 164–170.

(e) Declaration of trust, United Real Estate Company to the Girard Trust Company, of Philadelphia, and the Lehigh Valley Railroad Company, dated 14th day of July, A. D. 1903, as to other real estate in the city of Newark, known as the Alpine Street Terminal; conveyed to the United Real Estate Company by sundry deeds containing full descriptions of same, as follows:

(1) David G. Baird et ux to the United Real Estate Com-
63 pany, dated November 30, 1897, recorded in office of register of Essex County, New Jersey, in Deed Book D 31, page 339.

(2) John C. Groel et ux to the United Real Estate Company, dated March 31, 1902, recorded in office of register of Essex County, New Jersey, in Book D 35 of Deeds, page 382.

(3) Margaret W. Fort to United Real Estate Company, dated December 6, 1901, recorded in office of register of Essex County, New Jersey, in Book W 34, page 251.

(4) L. D. H. Gilmour et ux to the United Real Estate Company, dated April 21, 1902, recorded in office of register of Essex County, New Jersey, in Book K 35, page 51.

(4) Willard S. Muchmore to United Real Estate Company, dated April 21, 1902, recorded in office of register of Essex County, New Jersey, in Book K 35, page 50.

(5) Albert Lewis Lumber Company to United Real Estate Company, dated July 7, 1902, recorded in office of register of Essex County, New Jersey, in Book L 35, page 544.

(6) John S. Howkins et ux to United Real Estate Company, dated Nov. 8, 1902, recorded in office of register of Essex County, New Jersey, in Book D 36, page 14.

(f) Declaration of trust, United Real Estate Company to the Girard Trust Company, of Philadelphia, and the Lehigh Valley Railroad Company, dated 14th day of July, A. D. 1903, as to other real estate in the city of Newark, known as the Newark Coal Pockets; conveyed to the United Real Estate Company by David G. Baird et ux, by deed dated November 30th, 1897, and recorded in the office of the said register of deeds of Essex County in Deed Book D 31, page 349.

Third. Shares of capital stock of the following named companies, in the amounts (at par) stated, belonging to the railroad company:

64 I.

The Lehigh Valley Rail Way Company [a]	$7,720,000
Lehigh & New York Railroad Company (preferred)	2,148,506
Pennsylvania & New York Canal & Railroad Company	1,051,200
Schuylkill & Lehigh Valley Railroad Company	1,998,950

[a] Formed by merger August 3, 1903, of the following corporations: The Lehigh Valley Rail Way Company, The Depew & Tonowanda Railroad Company, Rochester Southern Railroad Company, Middlesex Valley Railroad Company, The Seneca County Railway, and The Waverly and State Line Railway Company.

Easton & Northern Railroad Company	$300,000
Lehigh Valley Railroad Company of New Jersey [a]	16,454,000
National Docks Railway Company	3,854,000
Lehigh Valley Transportation Company	750,000
The Lehigh Valley Coal Company	1,000,000
Hazleton Coal Company	500,000

II.

The Elmira, Cortland & Northern Railroad Company	2,000,000
The Canal Railroad Company	60,000
The Canastota Northern Railroad Company	200,000
Loyalsock Railroad Company	300,000
The Wilkes-Barre & Harvey's Lake Railroad Company	150,000
Coal Ridge Improvement & Coal Company	1,335,450
Coal Ridge Improvement & Coal Company (preferred)	122,350
Mineral Spring Coal Company	300,000
New York & Middle Coal Field Railroad & Coal Company	1,061,150
Westwood Coal Company	165,000
National Storage Company	2,400,000

65 The said stocks comprise the entire capital stocks of the companies above named with the exception of the following three minority interests outstanding in the hands of the public, viz, $1,654,842 of the stock of the Lehigh and New York Railroad Company; $42,200 of the stock of the Coal Ridge Improvement and Coal Company, and $438,850 of the stock of the New York and Middle Coal Field Railroad and Coal Company.

Fourth. All right, title, and interest of the Lehigh Valley Railroad Company, that may be hereafter acquired, in or to any and all other shares of stock of any of the companies above enumerated in subdivision third.

Fifth. All property of every name and nature hereafter acquired by the railroad company which, by any of the provisions of this indenture, it is required to convey, mortgage, pledge, assign, or transfer to the trustee.

Sixth. All property of every name and nature, from time to time hereafter, by delivery or by writing of any kind, for the purposes hereof, pledged, assigned, or transferred by the railroad company or by any one in its behalf to the trustee, which is hereby authorized to receive any property, at any and all times, as and for additional security, and also, when and as hereinafter provided, as substituted security, for the payment of bonds issued or to be issued hereunder, and to hold and apply any and all such property subject to the terms hereof.

Seventh. All estates, lands, properties, rights, privileges, and franchises, real, personal, or mixed, hereafter acquired by the railroad company, as appurtenant or incidental to, or in replacement of, or in exchange or substitution for any of the mortgaged premises above described.

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[a] Formed by merger July 29, 1903, of the following corporations: Easton and Amboy Railroad Company, Lehigh Valley Terminal Railway Company, Greenville and Hudson Railway Company, Middlesex Railway Company, Perth Amboy and Raritan Railway Company, and Pittstown Branch Railway Company.

66 To have and to hold, the premises, properties, real or personal, rights, franchises, estates, appurtenances, and stocks hereby granted, conveyed, and assigned, or mentioned or intended to be granted, conveyed, or assigned by the railroad company, with the appurtenances, unto the trustee, its successor or successors and assigns forever, but upon the trusts hereinafter declared:

Subject, as to certain portions of the property hereby mortgaged, conveyed, and pledged, to the mortgages of the railroad company recited in sec. 5 of article two hereof, so far as such mortgages respectively cover such property.

But as to all property hereby or hereunder conveyed or pledged, in trust nevertheless, for the equal and proportionate benefit and security of all present and future holders of the bonds and interest obligations issued and to be issued under and secured by this indenture, and for the enforcement of the payment of said bonds and interest obligations, when payable, and the performance of, and compliance with, the covenants and conditions of this indenture; without preference, priority, or distinction as to lien or otherwise of any one bond over any other bond by reason of priority in the issue or date or negotiation thereof, so that each and every bond, issued and to be issued as aforesaid, shall have the same right, lien, and privilege under and by this indenture, and so that the principal and interest of every such bond shall, subject to the terms hereof, be equally and proportionately secured hereby, as if all had been made, dated, executed, delivered, and negotiated simultaneously with the execution and delivery of this indenture; it being intended that the lien and security of this indenture shall take effect from the day of the date hereof without regard to the date of actual issue, sale, or disposition of said bonds as though upon such day all of said bonds were actually issued, sold, and delivered to, and in the hands of, innocent holders for value.

67 The conditions, uses, and trusts upon which the said premises and property are to be held by the trustee shall be as follows, to wit:

ARTICLE ONE.

SECTION 1. All bonds to be secured hereby shall, from time to time, be executed and delivered by the railroad company to the trustee for certification, and thereupon the trustee shall certify and deliver the same as provided in this article, and not otherwise. The aggregate amount of bonds issued and outstanding under this indenture at any one time shall never exceed the principal sum of $150,000,000.

Only such bonds as shall bear thereon endorsed the trustee's certificate by it duly executed shall be secured by this indenture, and every such certificate of the trustee upon any bond executed in the behalf of the railroad company shall be conclusive evidence that the bond so certified is one of the series of general consolidated mortgage gold bonds executed by the railroad company under this mortgage.

Before certifying or delivering any coupon bond hereby secured, the trustee shall cut off and cancel all coupons thereof then matured;

and the trustee shall not certify or deliver any registered bond bearing interest from any date six months or more prior to such certification or delivery.

Prior to any issue or issues of bonds intended to be secured hereby and until such issues, after being duly authorized, can be engraved and printed from engraved plates, the railroad company may execute and deliver printed bonds, registered, or negotiable by delivery, and substantially of the tenor of the bonds proposed to be issued hereunder, except that no coupons shall be attached to any of said bonds, and the same may be for the payment of one thousand dollars
68 or any multiple thereof, as the railroad company may determine. All such printed bonds shall have stamped or printed upon their face, "Temporary bond, exchangeable for engraved coupon or registered bonds," and shall, after execution, be duly certified by the trustee of this mortgage in the same manner as the bonds hereinbefore described, and such certificate shall be conclusive evidence that each of such bonds bearing such certificate is one of the temporary bonds executed by the railroad company hereunder. Such printed bonds, duly issued and certified hereunder, shall be exchangeable for engraved bonds, to be issued hereunder, and upon any such exchange such printed bonds shall forthwith be cancelled by the trustee. Until so exchanged, such printed bonds shall in all respects be entitled to the lien and security of these presents as bonds issued and certified hereunder, and interest, when and as payable, shall be paid thereon.

SEC. 2. Of the bonds authorized to be issued under and secured by this indenture:

(a) Immediately upon the execution and delivery hereof, or as and when requested thereafter by the railroad company, bonds to the amount of ten million dollars ($10,000,000), shall be certified by the trustee and delivered to the railroad company.

(b) Bonds to the amount of ten million dollars ($10,000,000) additional shall, as and when requested by the railroad company, be certified by the trustee and delivered to the railroad company on account of capital advances heretofore made by it in the payment of the annual installments due on the following securities of the rail-
69 road company, and to provide funds for further payments thereon, or on similar securities hereafter issued:

	Total issue.	
Car Trust Series A, due Feb. 1, 1906	$1,000,000	
Car Trust Series B, due Aug. 1, 1906	500,000	
Car Trust Series C, due June 1, 1909	2,000,000	
Car Trust Series D, due Mar. 1, 1910	3,000,000	
Car Trust Series E, due Feb. 1, 1909	656,000	
Car Trust Series F, due May 1, 1909	560,000	
Car Trust Series G, due Aug. 1, 1910	800,000	
		$8,516,000
Connell stock purchase bonds, due Mar. 1, 1906	600,000	
Seneca stock purchase bonds, due June 1, 1907	665,000	
Righter stock purchase bonds, due Apr. 1, 1908	270,000	
		1,535,000
		10,051,000

(c) Ninety-six million dollars ($96,000,000) of said bonds shall be reserved to be used and applied for the redemption, purchase, exchange, acquisition, or payment at or before maturity, of the following existing and outstanding obligations, constituting liens on property of the railroad company, and on property of corporations named in I and II of subdivision third of the granting clauses hereof. Such reserved bonds shall be called for by resolution of the board of directors of the railroad company when and as required for the purposes aforesaid, and in the amounts required and stated in such resolution, and the trustees shall on the receipt of a copy of such resolution, certified by the secretary or assistant secretary of the railroad company, certify and deliver to the railroad company so many of said reserved bonds as shall, at par, equal the amount required for the redemption, purchase, exchange, acquisition or payment by the railroad company of said obligations, if the price at which said obligations shall be redeemed, purchased, exchanged, acquired or paid, shall in the discretion of the trustee, be approved by it, but if such price shall be higher than the trustee shall approve, then the trustee shall, on the railroad company furnishing the additional funds required, certify and deliver to the railroad company so many only of said reserved bonds as shall equal in amount at par the price which the trustee shall, in its discretion, approve paying for the bonds so redeemed, purchased, exchanged, acquired, or paid. Said reserved bonds shall be used and applied only for the purposes aforesaid until all of said obligations shall have been redeemed, purchased, exchanged, acquired, or paid, after which, if any of said reserved bonds shall remain, they may be issued, used, and applied for such purposes as the board of directors of the railroad company shall decide, and shall, either at one time, or from time to time, be certified by the trustee and delivered to the railroad company on receipt of a copy, duly certified by the secretary or assistant secretary, of a resolution of said board calling for such issue and delivery. If any of said obligations shall be paid or acquired with funds provided by the railroad company from sources other than said reserved bonds, the trustee shall, as in the foregoing case, if duly requested as aforesaid by resolution of the board of directors of the railroad company, certify and deliver to the railroad company so many of said reserved bonds as shall at par equal the amount paid by the railroad company for said obligations, if the price paid shall be approved by the trustee, but if the price shall be higher than the trustee shall approve, then the trustee shall certify and deliver to the railroad company so many only of said reserved bonds as shall equal in amount at par the price which the trustee shall in its discretion approve paying for the bonds so redeemed, purchased, exchanged, acquired, or paid. Upon the payment or acquisition, either at their maturity or from time to time prior thereto, of the whole or any part of the several issues of said obligations, by means of said reserved bonds or any part thereof, or by funds advanced by the railroad company and subsequently reimbursed to the

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railroad company by delivery of said reserved bonds, such obligations shall be delivered to the trustee and cancelled; it being the intent that this mortgage securing the bonds issued hereunder shall ultimately become the first lien on the property of the railroad company, and that the liens, stated in the following table, on the properties of the companies whose stocks are pledged hereunder, shall be provided for by the bonds issued hereunder:

	Date.	Date of maturity.	Rate of interest.	Bonds outstanding at date of this indenture.
Lehigh Valley R. R. Co.:				
First mortgage	May 15, 1868	June 1, 1948, as extended.	4%	$5,000,000
Second mortgage	June 29, 1870	Sept. 1, 1910	7%	6,000,000
Con. mortgage	Nov. 13, 1873	Dec. 1, 1923	6%	5,638,000
Con. mortgage	Nov. 13, 1873	Dec. 1, 1923	4½%	4,762,000
" " (ann. bonds)	" " "	Perpetual.	6%	10,062,000
" " (ann. bonds)	" " "	Perpetual.	4½%	2,538,000
Collateral trust mtge	May 1, 1897	May 1, 1997	5%	9,568,000
National storage trust certificates	Dec. 8, 1899	Dec. 8, 1904-9	4%	5,000,000
Lehigh Valley Railway Company:				
First mortgage	June 23, 1899	July 1, 1940	4½%	15,000,000
Lehigh Valley Terminal Railway Company:				
First mortgage	Oct. 1, 1891	Oct. 1, 1941	5%	10,000,000
Easton & Amboy R. R. Company:				
First mortgage	Apr. 13, 1880	May 1, 1920	5%	6,000,000
Penn. & New York Canal & Railroad Co.:				
First mortgage	June 1, 1866	June 1, 1906	7%	1,500,000
Con. mortgage	Nov. 13, 1888	Apr. 1, 1939	5%	4,000,000
Con. mortgage	Nov. 13, 1888	Apr. 1, 1939	4½%	1,500,000
Con. mortgage	Nov. 13, 1888	Apr. 1, 1939	4%	3,000,000
Elmira, Cortland & Northern Railroad Co.:				
First mtge. (pref. bonds)	Apr. 1, 1884	Apr. 1, 1914	6%	750,000
First mtge	Apr. 1, 1884	Apr. 1, 1914	5%	1,250,000
Canastota Northern R. R. Co.:				
First mortgage	July 1, 1886	July 1, 1906	6%	300,000
Middlesex Valley R. R. Company:				
First mortgage	Aug. 26, 1892	Nov. 1, 1942	5%	211,000
Easton & Northern R. R. Company:				
First mortgage	Oct. 7, 1895	Nov. 1, 1935	4½%	51,000
Lehigh Valley Coal Company:				
Five ten-year coal pledge bonds	Nov. 21, 1902	Dec. 1, 1907-12	5%	2,000,000
				94,130,000

72 SEC. 3. The remainder of the authorized issue hereunder, amounting to $34,000,000 of said bonds, shall be reserved, to be executed, and to be certified by the trustee, not immediately, but only when and as called for by resolution of the board of directors of the railroad company as next hereinafter provided, for the following purposes, or some one or more of them, viz.:

(a) For the construction or acquisition, on and after January 1st, 1905, of railway lines, extensions, terminal properties or rolling stock; or for the construction or acquisition on and after that date of other property real or personal; or for the constructon of betterments, improvements or enlargements, on and after that date; all such construction, betterments, improvements or enlargements or property acquired, to be upon, along, or appurtenant to the properties of the railroad company at the time subject to the lien of this indenture, or to be useful to the business of the railroad company, or upon, along or appurtenant to properties of, or useful to the business of, some one or more of the companies mentioned in Subdivision Third of the

granting clauses hereof whose stock is at the time pledged hereunder, or of some other company of whose capital stock no part is now pledged hereunder, but of whose capital stock more than one-half, at the time of such use, shall be pledged hereunder, it being intended that such lines, extensions, terminal properties, betterments, improvements, and enlargements or other property may be constructed or acquired by and in the name of the railroad company or by or in the name of or for account of any such other company; or for the acquisition on and after January 1st, 1905, of shares, bonds, or other obligations of any company owning any line, extension, terminal property, lands, coal estates, rolling stock, floating equipment, or other property the acquisition of which would, in the judgment of
73 the board of directors of the railroad company, render the holding of such stock, bonds, or obligations useful or advantageous to the railroad company.

(b) For the acquisition of bonds of the Lehigh Valley Coal Company that may be issued under the provisions of sec. 12 of article two hereof; provided that, in every case of any such acquisition, the aggregate par value of such bonds so acquired shall be at least equal to the aggregate par value of the bonds hereby secured, used for such acquisition.

(c) To reimburse the railroad company for outlays or advances by it made for, or to promote, any construction or acquisition made pursuant to (a) or (b) hereof on or subsequent to January 1st, 1905, or made theretofore since January 1st, 1900, and not previously reimbursed to the railroad company by the issuance to it of bonds under its collateral trust mortgage, dated May 1st, 1897.

The bonds reserved under this section shall by the trustee be certified and delivered to the railroad company, or upon its order, as follows, and not otherwise, viz.:

(1) Such bonds shall be certified and delivered by the trustee from time to time only as and when it shall receive a copy of the resolution of the board of directors of the railroad company, certified by its secretary or assistant secretary, calling for the certification and delivery of such bonds, and stating that such bonds or their proceeds will be used only for purposes authorized by this session.

(2) On January 1st, 1906, or on any day thereafter (prior to December 31st, 1906), bonds to such amount as shall be called for in such resolution, shall be so certified and delivered, but not exceeding in the aggregate $2,000,000, par value, unless a larger issue shall be especially authorized as provided in (5) of this section.

74 (3) In each calendar year after December 31st, 1906, there shall be so certified and delivered such additional amount of such bonds, not exceeding $2,000,000 par value in any calendar year except to supply deficiencies and unless a larger issue shall be especially authorized, as provided in (5) of this section, as from time to time shall be called for in similar resolutions, but in every instance before certifying and delivering any of the bonds reserved under this section (except the $2,000,000 deliverable in the year 1906), the

trustee shall require the railroad company to furnish, in addition to such resolutions of its board of directors, the verified certificate or certificates of some person or persons, stating as of his or their own knowledge:

(a) That the bonds last certified and delivered under this section or the proceeds of all such bonds, have been used for such purposes, or for some one or more of them, or to reimburse the railroad company as above provided, specifically indicating every such acquisition or construction of any railroad, structure, betterment, rolling stock, or other property, and every such acquisition of bonds of the Lehigh Valley Coal Company and every such acquisition of stock, bonds, or other obligations of any other company owning any railroad or other property, and also stating in detail the amount of bonds, or proceeds of bonds, used or expended for each and every such purpose, and whether such acquisition was by or in the name of the railroad company, or by or for account of any other company as herein authorized; and also that no acquisition, construction, or expenditure stated in such certificate was stated in any previous certificate;

(b) That the price paid in such bonds, or their proceeds, for any such construction, or acquisition (other than for bonds of the Lehigh Valley Coal Company, as aforesaid), was not in excess of the fair value of the work done or property acquired.

75 (4) Every such verified certificate, unless signed (1) by the president or by a vice-president and (2) by the comptroller or auditor or treasurer of the railroad company, shall be accompanied by a written statement of one of the officers first above designated and one of the officers secondly above designated of the railroad company that they believe such certificate to be true, and that such bonds have not been used and the expenditures therein certified have not been made for ordinary maintenance of the property owned, leased, or in any way controlled by the railroad company, or for replacements or other purposes ordinarily treated by similar companies or companies owning similar properties, as a part of their operating expenses. Together with such statements and verified certificates, there shall be delivered to the trustee all bonds and certificates for all shares of stock so acquired and such further instruments and conveyances as may be necessary to vest in the trustee all new property so acquired, so far as the same shall have been acquired by or for the railroad company, and so far as practicable any and all other liens, charges, or indebtedness taken up or acquired with the said bonds or their proceeds, and also the written opinion of counsel of the railroad company to the effect that such instruments and conveyances are sufficient for that purpose, or that no instrument or conveyance is necessary. The certificates for all shares of stock so acquired shall be duly transferred into the name of the trustee and shall be classified under either I or II of subdivision third of the granting clauses hereof, as shall, with the approval of the trustee, be designated by the railroad company. Such resolutions, statements, instruments, and conveyances, verified certificates, and opinion (together with the

pledge with the trustee of all bonds and certificates for all shares of stock so acquired) shall be deemed and taken as plenary authority to the said trustee for its certification of such bonds under the foregoing provisions of this article.

76 (5) Except to supply deficiencies as next hereinafter provided, there shall not be issued or certified under this section in any one calendar year any of said $34,000,000 bonds in excess of an aggregate amount of $2,000,000; provided, however, that if a larger amount than $2,000,000 should, in the opinion of the board of directors of the railroad company, be required in any year or years for some of the purposes for which the said $2,000,000 in bonds may annually be issued as above provided, then and in that case if the stockholders of the railroad company shall at any annual meeting or at any special meeting called for the purpose approve by a vote of a majority in interest of the stock represented in person or by proxy at such meeting the issue of additional bonds under this section, then any amounts so approved by the stockholders in excess of $2,000,000 may be issued in such year or years, and on demand of the railroad company shall be certified and delivered by the trustee to the railroad company or upon its order.

If in any calendar year after January 1, 1906, the trustee shall not have certified and delivered to the railroad company or upon its order two million dollars ($2,000,000) of bonds authorized by (2) and (3) of this section to be certified and delivered for such calendar year, or any additional amount or amounts approved as aforesaid by the stockholders, the right of the railroad company to require certification and delivery of any such residue of such $2,000,000 bonds and of any additional amount or amounts so approved which may not have been actually certified and delivered in such calendar year shall not lapse nor be extinguished, but such residue of such bonds not so certified and delivered in any calendar year shall be certified and delivered by the trustee to the railroad company or upon its order from time to time in any subsequent year or years upon the resolution of the board of directors of the railroad company, as hereinbefore provided, accompanied by the statements, veri-

77 fied certificates and opinion hereinbefore prescribed, notwithstanding the fact that under the provisions of this section and to the extent herein authorized there shall thereby be certified and delivered by the trustee in such year or years more than $2,000,000 bonds.

(6) The $150,000,000 of bonds to be issued hereunder may be issued in such denominations, at such rate of interest not exceeding five per cent per annum, and in such form, consistent with the terms of this indenture, as the board of directors of the railroad company shall prescribe at the time or times of such issue; and any bonds which may have been part or all of said entire $150,000,000 of bonds issued under this mortgage may at any time be extended at a less rate of interest than that named therein, or the interest on any bond hereby secured

may at any time and from time to time be reduced with the consent of the then holder of such particular bond.

SEC. 4. Whenever any coupon bond or bonds issued hereunder, together with all unmatured coupons thereto belonging, shall be surrendered for exchange for a registered bond, or for registered bonds as the case may be, the railroad company shall issue, and the trustee shall certify and deliver, in exchange for such coupon bond, a registered bond without coupons; or if there be more than one coupon bond so surrendered, then a like amount of registered bonds without coupons, of the same or of other denominations, as herein authorized. Such registered bond or bonds shall bear interest at the same rate as the surrendered coupon bond or bonds, and from the date of the last matured coupon thereof. In every case of such exchange the trustee forthwith shall cancel the surrendered bond or bonds and coupons, and shall deliver the same to the railroad company.

Whenever any registered bond or bonds issued hereunder shall be surrendered for transfer, the railroad company shall issue and the trustee shall certify and deliver, upon surrender and cancella-
78 tion of the bond or bonds transferred, a like amount of new registered bonds of the same or of other denominations as herein authorized; but no registered bond may be converted into a coupon bond.

The board of directors of the railroad company may at the time of issue (or of any reissue as hereinafter provided) of any bonds hereunder, order that such bonds shall, the election of the holder, be convertible at any half-yearly interest period into common stock of the railroad company at par; provided, that notice in writing of such election on the part of such holder, specifying the numbers of the bonds to be converted, shall have been given to the railroad company at its office or agency in the city of Philadelphia, or in the city of New York, at least thirty days prior to the half-yearly interest day on which such conversion is desired (which shall be the half-yearly interest day next ensuing the giving of such notice). Upon surrender of any such bond or bonds to the railroad company at any interest period, after notice as aforesaid, interest thereon shall cease, and the railroad company shall deliver such bond or bonds, duly cancelled, to the trustee, and shall issue to the holder in exchange therefor so many shares of the capital stock of the railroad company at the par value thereof, as shall equal the par value of the bond or bonds so surrendered. Any bonds surrendered as aforesaid for conversion into stock may be reissued, but only for the purpose stated in (a), (b), and (c) of sec. 3 of this article, and such reissue may be made as often as such conversion of bonds into stock shall have been made and in such amounts as said board of directors shall from time to time order; and the bonds so reissued shall be of such denomination, at such rate of interest, and in such form as said board shall at the time of reissue order; provided, that the total amount of bonds issued or reissued and outstanding under this mortgage containing the said provisions

for conversion into capital stock shall not at any time exceed
79 $25,000,000. Such bonds shall on demand made by the railroad company on the trustee, be certified and delivered to the railroad company by the trustee from time to time, in such amounts as the railroad company shall demand, but only on receipt by the trustee from the railroad company of a copy of a resolution of the board of directors of the railroad company, certified by its secretary, or assistant secretary, calling for the certification and delivery of such bonds, and stating that such bonds, or their proceeds, will be used only for the purposes stated in (a), (b), or (c) of sec. 3 of this article, with also (except in respect to the first lot of such bonds so reissued) verified certificates showing the uses to which the previous reissue of bonds, or their proceeds, have been applied, with also any necessary instruments and conveyances and opinion of counsel, such certificates, resolutions, statements, instruments, conveyances, and opinions to be similar to those provided for in (a) and (b) of (3) and in (4) of sec. 3 of this article. In case of reissue, the trustee shall certify any new bonds issued in place of any bonds of other form or denominations so surrendered. Provided, always that the total outstanding bonds under this mortgage shall in no case and at no time exceed $150,000,000.

For any exchange of coupon bonds for registered bonds, or of bonds for stock, and for any transfer of registered bonds without coupons, the railroad company, at its option, may make a charge not exceeding fifty cents for each new registered bond issued in exchange for any surrendered bond or bonds; but no charge shall be made for registration of the principal of coupon bonds.

In case any coupon bond issued hereunder, with the coupons thereto appertaining, or any registered bond without coupons, shall become mutilated or be destroyed, the railroad company, in its discretion, may issue, and the trustee thereupon may certify and deliver, a new bond of like tenor and date bearing the same serial number, in exchange and substitution for and upon cancellation of the
80 mutilated coupon bond and its coupons or of the registered bond, or in lieu of and substitution for the coupon bond and its coupons or the registered bond so destroyed, upon receipt by the railroad company of satisfactory evidence of the destruction of such coupon bond and its coupons, or of such registered bond, and upon receipt also of satisfactory indemnity.

SEC. 5. Nothing in this article, or in any other article of this indenture expressed or implied, is intended, or shall be construed, to confer upon any person or corporation, other than the parties hereto and the holders of bonds secured by this indenture, any legal or equitable right, remedy, or claim under or in respect of this indenture, or any covenant, condition, or stipulation thereof; all its covenants, conditions and stipulations being intended to be, and being for the sole and exclusive benefit of the parties hereto and of the holders of bonds hereby secured.

ARTICLE TWO.

The railroad company covenants as follows:

SEC. 1. It will well, duly, and punctually pay, or cause to be paid to every holder of any bond issued and secured hereunder, the principal and interest accruing thereon, at the dates and place and in the manner mentioned in such bonds, and in the coupons thereto belonging, according to the true intent and meaning thereof, without deduction from either principal or interest for any tax or taxes imposed by the United States, or any State, county, or municipality therein, which the railroad company may be required to pay, or to retain therefrom, under or by reason of any present or future law. When and as paid, all coupons shall forthwith be canceled.

SEC. 2. All lines of railway and all property of every kind,
81 and all interest therein, when and as and to the extent hereafter acquired by the railroad company as above provided, out of bonds, or the proceeds of bonds, issued pursuant to the provisions of (a) or (b) of sec. 2, or of sec. 3, or of sec. 4, of article one hereof, immediately upon, and subject to the terms and conditions of such acquisition, and without any further conveyance or assignment, shall become and be subject to the lien of this indenture as fully and completely as though now owned by the railroad company, and expressly and specifically conveyed by, and embraced in, the several granting clauses of this indenture; but at any and all times the railroad company will execute and deliver any and all such further assurances or conveyances thereof as the trustee may reasonably direct or require, for the purpose of expressly and specifically subjecting the same to the lien of this indenture.

Immediately upon payment of the bonds of the railroad company secured by its collateral trust mortgage dated May 1st, 1897, and upon the transfer and delivery to the railroad company by the trustee under said collateral trust mortgage of such stocks pledged under said mortgage, as are also pledged hereunder, such stocks shall be transferred and delivered to and held by the trustee under this indenture; and similarly, immediately upon the payment of the certificates issued by the Central Trust Company of New York under agreement dated December 8th, 1899, between said trust company and the railroad company and upon the transfer and delivery to the railroad company by the said Central Trust Company, trustee, of the stocks pledged under said agreement which stocks are also pledged hereunder, said stocks shall be transferred and delivered to and held by the trustee under this indenture.

SEC. 3. Whenever demanded by the trustee, the railroad company will grant, convey, confirm, assign, transfer, and set over unto the trustee, all real and personal estate, corporate rights and franchises
which, in any way or manner it shall acquire (out of such
82 bonds, or the proceeds of bonds, issued, as aforesaid, pursuant to the provisions of (a) or (b) of sec. 2, or of sec. 3, or of sec. 4, of article one hereof), as incidental or appurtenant to, or for

use upon, any property mortgaged hereunder, and will also do, execute, acknowledge, and deliver, and cause to be done, executed, acknowledged, and delivered, all and every such further acts, deeds, conveyances, and transfers, and assurances in the law, for better assuring, conveying, and confirming unto the trustee all and singular the hereditaments and premises, estates, and property hereby conveyed, or intended so to be, or which it has herein covenanted and agreed hereafter to convey to the trustee, as the trustee shall reasonably require for better accomplishing the provisions and purposes of this indenture, and for securing payment of the principal and interest of the bonds intended to be hereby secured.

But nothing expressed or implied in this indenture is intended, or shall be construed, to limit the right or power of the railroad company, hereby expressly reserved, by the use of its credit or in any manner, except by the use of bonds issued hereunder, or funds received pursuant to any provision hereof, to construct or to acquire property of any kind, or interest therein, free from the lien hereof.

SEC. 4. The railroad company will, at an office or agency to be maintained by it in the city of Philadelphia, keep a sufficient register or registers of bonds issued hereunder, which registers at all reasonable times shall be open to the inspection of the trustee; and, upon presentation for such purpose, it will, under such reasonable regulations as it may prescribe, register therein any coupon bonds and any bonds without coupons issued under the provisions hereof.

Upon presentation of any such registered coupon bond by the holder thereof in person, or upon its presentation with an instrument in writing authorizing the transfer of the same, executed by the registered holder, such bond shall be transferred upon such
83 register, and thereafter the transferee or transferees of such bond upon such register shall be held to be the owner or owners thereof, and from time to time such transfers may be made as shall be so directed by the registered holder of any such bond for the time being. The registered holder of any such registered coupon bond shall have the right also to cause the same to be registered as payable to bearer, in which case transferability by delivery shall be restored, and thereafter the principal thereof shall be payable to any person presenting the same.

Any holder of a coupon bond registered to bearer may cause such bond to be registered in the name of such holder with the same effect as a first registration thereof; and successive registrations and transfers to bearer as aforesaid may be made from time to time as desired; and such registration shall by the bond registrar be noted on the bond.

Any registered bond without coupons may be transferred by the registered holder in person, or by instrument in writing executed by the registered holder, upon surrender of the bond, in which case a like amount of new registered bonds will be issued to the transferee as provided in sec. 4 of article one hereof, on payment of the charge provided for in said section.

As to all bonds so registered, the persons in whose name the same shall be registered shall for all purposes of this indenture be deemed and regarded as the owner hereof, and thereafter payment of or on account of the principal of such bond, if it be a coupon bond, and of the principal and interest, if it be a registered bond without coupons, shall be made only to such registered holder or upon his order; but such registration may be changed as hereinbefore provided. All such payments so made shall be valid and effectual to satisfy and discharge the liability upon such bond to the extent of the sum or sums so paid.

No registration of any coupon bond shall restrain the negotiability of any coupon thereto belonging, but every such coupon shall continue to pass by delivery merely.

84 SEC. 5. Until such bonds shall be paid and discharged, the railroad company will duly, punctually and regularly pay or cause to be paid as from time to time the same shall accrue the interest on its following bonds outstanding at the date of this indenture:

First mortgage 4% bonds due 1948	$5,000,000
Second mortgage 7% bonds due 1910	6,000,000
Consolidated mortgage 6% bonds due 1923	5,638,000
Consolidated mortgage 6% annuity bonds	10,062,000
Consolidated mortgage 4½% bonds due 1923	4,762,000
Consolidated mortgage 4½% annuity bonds	2,538,000
Collateral trust mortgage 5% bonds, due 1997	9,568,000
Equipment trust bonds	5,547,000
Connell stock purchase 4% bonds	300,000
Seneca stock purchase 4% bonds	400,000
Righter stock purchase 4% bonds	225,000
National storage 4% certificates	5,000,000
	$55,040,000

and in the meantime it will observe, or will cause to be observed, all the covenants, terms and conditions undertaken by, or imposed upon said railroad company, in or by any such bonds or the several respective mortgages securing the same, and in all cases it will duly and punctually pay the principal of such bonds at the several dates of the maturity thereof as now fixed or as from time to time hereafter extended as in this section permitted. But nothing in this article or in any other article of this indenture is intended, or shall be construed, to require the railroad company, not then being otherwise in default hereunder, to pay the principal of any such outstanding bond during any period for which the same shall have been extended or renewed as next hereinafter permitted; the right being hereby expressly reserved by the railroad company in the discretion of its board of directors, from time to time, with the consent of the holders

85 thereof, to extend the time for the payment of the principal of any said outstanding bonds for any period not exceeding two years, if at the date of maturity thereof it shall not in the opinion of the board be advisable to arrange for the refunding or payment thereof through and by the bonds reserved hereunder for the purpose, reserving in case of such extension the right on sixty days notice published once a week in one newspaper published in the city of Philadelphia and in one newspaper published in the city of New York, to

call in and pay off the same at any interest period through and by means of the bonds so reserved hereunder: Provided that the aggregate principal sum or the rate of interest of such outstanding bonds shall not be increased, though the principal and interest of all such extended bonds may be made expressly payable in gold coin of the United States of the standards of weight and of fineness at the time of the extension thereof.

SEC. 6. The railroad company will not (except as above provided) voluntarily create or suffer to be created any new lien or charge upon the mortgaged premises of the railroad company, or any part thereof, or upon the income thereof, having priority to the lien of this indenture; and will not after the execution of this mortgage issue any bonds theretofore unissued under any of its mortgages prior to this indenture; provided, however, that bonds reserved under the terms of said prior mortgages for the purpose of providing for prior liens may be issued unless due provision can be made, as set forth in (c) of sec. 2, of article one hereof for the redemption, purchase, exchange, acquisition, or payment by bonds issued hereunder, of such prior liens; and provided, that the $1,668,000 of bonds under its collateral trust mortgage which have been issued to the railroad company and are now in its treasury (and are included in the $9,568,000 stated in sec. 5 of this article), and represent disbursements
86 heretofore made on the property of the company, may be issued from its treasury and sold or disposed of by it. And the railroad company will not at any time sanction or permit the issue, by any company whose stock at the time shall be pledged hereunder, of any bonds reserved under mortgages of said companies respectively for the purpose of providing for the payment of prior liens if due provision can be made, as set forth in (c) of sec. 2 of article one hereof, for such prior liens; and will immediately, on the payment of its outstanding $5,000,000 of National Storage Company trust certificates, secured by agreement dated December 8, 1899, and on the release and delivery to it of the $2,000,000 of its collateral trust mortgage bonds pledged under said agreement, cause the said pledged bonds to be cancelled. And, within six months after the same shall accrue, the railroad company will from time to time pay all lawful claims and demands of mechanics, laborers, and others, which, if unpaid, might by law be given priority to this indenture as a lien or charge upon the mortgaged premises or any part thereof, or the income thereof; and if any company, of whose capital stock the greater part now is or hereafter shall be pledged hereunder, shall create or suffer to be created any lien or charge upon its property or income, or shall create or suffer to be created any indebtedness, other than (1) mortgage indebtedness as hereinafter permitted, (2) indebtedness of the coal company as hereinafter permitted, (3) indebtedness to the railroad company, or (4) indebtedness for the current operating expenses of such company during a period not exceeding six months; then it, the railroad company, will pay and discharge the same, or

will acquire the same and transfer the same to the trustee for the benefit of this mortgage.

SEC. 7. The railroad company from time to time will pay and discharge all taxes, assessments, and governmental charges lawfully imposed upon the premises hereby mortgaged, or upon any
87 part thereof, or upon the income and profits thereof, the lien of which would be prior to the lien hereof, so that the priority of this indenture shall be fully preserved in respect of such properties; and if any company of whose capital stock the greater part now is, or hereafter shall be, pledged hereunder, shall, at any time during the continuance of any such pledge, fail to pay all such taxes, assessments, and charges lawfully imposed upon the property of such company or upon the income and profits thereof, then it, the railroad company, will itself pay and discharge the same; provided that the covenants of this section shall not require the railroad company to pay any tax, assessment, or charge, so long as the validity thereof is in good faith contested.

SEC. 8. The railroad company from time to time and at all times during the continuance of this indenture, and until the payment of all bonds issued hereunder, will maintain the mortgaged premises and each and every part thereof, and will replace the same and all parts thereof lost, destroyed, or used up so far as the same may be needed. The mining and selling of coal by any coal company the stock of which is owned or controlled by the railroad company, without replacement, reservation of royalty, or provision for sinking fund, shall not be construed as a violation of this covenant.

SEC. 9. The railroad company will exercise the voting power on all stocks pledged hereunder in such manner that it shall retain in itself the rights and powers of the holder of the greater part of the capital stock of such company; and as such holder of stock of any company above mentioned in I and II of subdivision third of the granting clauses hereof, or of stock of any other company whose stock the greater part shall at such time be pledged hereunder, the railroad company will not, by affirmative vote, or by abstaining from voting, sanction or permit any increase of the capital stock of
88 any such company or the creation of any so-called "floating" indebtedness of any such company (except current operating accounts for a period not at any date exceeding six months prior thereto), or (except in respect of the Lehigh Valley Coal Company as hereinafter permitted) the issue or guaranty of any bonds by any such company, or the creation of any mortgage or other lien upon the railroad or property of any such company (except bonds or mortgages or other liens in extension or replacement of those now existing), unless effective provision be made that all such additional stock (or such part of such additional stock as shall be proportionate to the part of such entire capital stock previously pledged hereunder), and (except as hereinafter provided in respect of the Lehigh Valley Coal Company) that any such indebtedness and the evidences thereof, and any such bonds issued or guaranteed, and any such mortgage or

other lien, immediately upon the issue of such stock, or creation of such indebtedness, shall be delivered to and peldged with the trustee, by it to be held subject to all the trusts of this indenture, with the same effect as if such stock, indebtedness, bonds, mortgage or other lien, had been delivered and pledged to it hereunder at the time of the making hereof; and all such additional stock shall be fully paid and nonassessable. But nothing in this article or in any other article of this indenture is intended, or shall be construed, to require the railroad company to so deliver and pledge any bonds or obligations of such companies heretofore issued. And the right is hereby expressly reserved by the railroad company, in the discretion of its board of directors, from time to time, to take all necessary steps to procure the extension, for a period not exceeding two years, of the time for the payment of the principal of such of the existing bonds of such companies, for the payment of which provision has been made by (c) of sec. 2 of article one hereof, if at the date of maturity thereof it shall not be advisable in the opinion of the said board to
89 arrange for the redemption, purchase, exchange, acquisition or payment thereof through and by the bonds reserved hereunder for the purpose, reserving in case of such extension the right on sixty days' notice, published once a week in one newspaper published in the city of Philadelphia, and in one newspaper published in the city of New York, to call in and pay off the same at any interest period through and by means of the bonds reserved hereunder, but in such extension the aggregate principal sum or the rate of interest now charged on such property by such existing liens shall not be increased though the principal and interest of all such extended bonds may be made expressly payable in gold coin of the United States of the standards of weight and of fineness at the time of such extension.

SEC. 10. The railroad company will not by affirmative vote, or by abstaining from voting, permit any railroad company, of whose capital stock the greater part shall at the time be pledged hereunder under I of subdivision third of the granting clauses hereof, to sell or dispose of its railroad, except to some company of whose capital stock there shall then be held or received by the railroad company and pledged or assigned to the trustee hereunder, an amount not proportionately less than the amount then held hereunder of the capital stock of the company whose railroad shall be so sold. Provided that any parts of such railroad not required for the proper exercise of the public franchises of such company may be sold or disposed of with the approval of the trustee. The railroad company may, however, permit any railroad company of whose capital stock the greater part shall at the time be pledged hereunder under II of subdivision third of the granting clauses hereof, to sell or dispose of its railroad or any part thereof to any company or other party, or to exchange its railroad or any part thereof for property of such other company or party if in the opinion of the trustee such sale shall not be prejudicial to the security of the bonds issued and secured hereunder.

90 In case of any sale as aforesaid the proceeds of such sale shall be applied as provided by any mortgage then existing on such property, and if not so subject, then so far as may be practicable, as provided under sec. 2 of article six hereof in respect to other property sold or disposed of.

SEC. 11. The railroad company will not issue, negotiate, sell, or dispose of any bonds hereby secured, in any manner other than in accordance with the provisions of this indenture, and the agreements in that behalf herein contained; and in issuing, selling, negotiating, or otherwise disposing of such bonds, from time to time, it will well and truly apply, or cause to be applied, the same, or the proceeds thereof, to and for purposes herein prescribed, and to and for no other or different purpose.

SEC. 12. It is expressly understood, anything in this indenture to the contrary notwithstanding, that the Lehigh Valley Coal Company, may, from time to time, borrow money and may secure the repayment thereof, by a pledge or hypothecation of coal when actually mined, or the representatives or proceeds of coal when actually mined, it being further understood, however, that the amount of money so borrowed shall never exceed the fair market value of coal so actually mined and the coal accounts, bills receivable, notes, and other representatives and proceeds of such coal, then held by the coal company; and may execute and issue bonds, to be secured by mortgage upon its property, to provide for the improvement of its property, and for the acquisition of new coal properties, all such mortgages to contain proper sinking fund provisions, by which the payment of such bonds shall be provided for out of and from the coal to be mined from the property of said company.

SEC. 13. The trustee from time to time upon written request of the railroad company signed by the president or any vice-president
91 and under its corporate seal duly attested by the secretary or assistant secretary shall give to the railroad company or its nominees suitable proxies to give full effect to the provisions of this article.

ARTICLE THREE.

SEC. 1. Unless (a) the railroad company shall be in default in the payment of interest on any bond secured by this indenture, or unless default shall be made in the payment of interest on any bond mentioned in sec. 5 of article two hereof, and such default shall have continued for a period of six months; or unless (b) the railroad company shall be in default in the due and punctual payment of the principal of any bond secured hereby, or of any bond mentioned in sec. 5 of article two hereof, or unless (c) the railroad company shall be in default in the payment of any tax, assessment, or other governmental charge lawfully imposed or levied upon any part of the property and premises hereby mortgaged, or the income and profits thereof, and such default shall have continued for a period of six

months after written notice thereof from the trustee or from holders of five per cent in amount of the bonds secured hereby; or unless (d) the railroad company shall be in default in the due performance and observance of any covenant or condition of this indenture and such default shall have continued beyond the period of grace, if any, herein provided for in respect of such default, and the trustee shall have entered or shall have elected to enter into possession under the power of entry hereinafter conferred; or unless (e) the railroad company shall have voluntarily surrendered to the trustee possession of the mortgaged premises as hereinafter authorized, the trustee (unless with the assent of the railroad company) shall not collect or be entitled to collect the interest of any bonds or the principal or interest of other claims or indebtedness hereafter pledged with or assigned to the trustee under this indenture; and (1) the rail-
92 road company shall be entitled to receive all interest due and dividends declared in respect of any bonds or stocks transferred to or pledged with the trustee pursuant to any of the provisions of this indenture; and from time to time (subject to the covenants in respect hereof in this section contained), upon the request of the railroad company, the trustee shall deliver to it the coupons for such interest, in order that the railroad company may receive payment thereof for its own use, and shall deliver to the railroad company suitable orders in favor of the railroad company or its nominee for the payment of such dividends and for the payment of such interest on registered bonds; and the railroad company may collect such interest and dividends, but not by any proceeding which the trustee shall deem and declare to be prejudicial to the trusts hereunder; and the trustee shall at once pay over to the railroad company any such interest and dividends which may be collected or received by it; and (2) the railroad company shall be entitled for its own use to demand, receive, and collect, release, and discharge, the principal or interest of any such claim against, or indebtedness (other than bonds) of, any other company assigned to or pledged with the trustee hereunder, and upon request of the railroad company the trustee shall execute any reassignments or releases which may be required for that purpose.

If any such coupon, or if any evidence of any such claim or indebtedness, delivered to the railroad company as aforesaid, shall not as aforesaid forthwith be paid and cancelled, the railroad company shall return the same to the trustee, and in case of the payment of any such coupon, claim, or indebtedness, shall upon demand of the trustee furnish satisfactory evidence of the cancellation and extinguishment thereof.

Provided, however, and it is hereby declared and agreed that, except as herein otherwise expressly provided (1) the railroad company shall not be entitled to receive, and the trustee shall not pay over to it, any principal of any bond pledged or assigned to the trustee
93 hereunder; (2) the railroad company shall not be entitled to receive, and the trustee shall not pay over, any interest on any such bond or any principal or interest of any such other claim or in-

debtedness which shall have been collected or paid out of the proceeds of any sale of any property covered by a mortgage securing such bonds, or out of the proceeds of the sale of any other property of the company liable upon such bonds, claims, or indebtedness, it being the intention that the railroad company shall be entitled to receive only payments made out of the rents, revenues, income, or proceeds of operation of such properties; (3) the railroad company shall not sell, assign, or transfer any such coupon or right to dividend, delivered or assigned to it, or any other such claim or indebtedness, except subject to this indenture; (4) the railroad company shall not collect any such coupons or other claims or indebtedness by legal proceedings or by enforcement of any security therefor, except with the assent of the trustee, nor in any manner which the trustee shall deem prejudicial to the trust hereunder; and (5) until actually paid or discharged every such coupon or right to dividends and other claims and indebtedness shall in all respects remain subject to the lien of this indenture.

SEC. 2. In case any sum shall be paid to the trustee on account of the principal of any bond hereafter pledged with the trustee hereunder, or in case, upon the dissolution or liquidation of any company, or out of any sale of the property of any company, any sum shall be paid to the trustee upon any shares of stock of such company held by the trustee hereunder, or upon any claims against or indebtedness of such company, as mentioned in sec. 1 of this article, then in every such case (unless applied as in section 5 of this article provided) such sum shall be received by the trustee and shall be held, used, and applied in the same manner as the proceeds of similar property released under article 6 hereof.

94 SEC. 3. Unless (1) the railroad company shall be in default, and such default being one mentioned under (a), (b), or (c) of sec. 1 of this article, shall have continued as therein provided, or being one mentioned under (d) in said section, the trustee shall have entered, or shall have elected to enter, into possession, or unless (2) the railroad company shall have voluntarily surrendered possession of the mortgaged premises as hereinafter authorized, the railroad company shall have the right to vote upon all shares of stock pledged hereunder, for all purposes not inconsistent with the provisions or purposes of this indenture, and with the same force and effect as though such pledge had not been made. The trustee from time to time, upon written request of the railroad company, signed by the president or any vice-president and under its corporate seal duly attested by the secretary or assistant secretary, shall give to the railroad company or its nominees suitable proxies for such purposes; it being expressly understood that, notwithstanding any other provision of this indenture, and in addition to all other purposes not inconsistent with the provisions or purposes of this indenture, such proxies may and shall, if desired by the railroad company, be given to enable it or its nominees to vote, and that accordingly it or they may vote upon all shares of stock of any company pledged hereunder (1) to enable such company to change, alter or renew, or terminate any existing lease of

railway or other property leased to or by it, or (2) to make a new lease of all or any part of the railway or other property covered by any such existing lease, or to lease additional lines of railway or other property, unless, in the opinion of the trustee, such a change, alteration, renewal, or termination, or such new lease or such lease of additional lines is likely to be prejudicial to this trust; (3) to authorize the merger or consolidation of any two or more of the companies whose capital stock is or shall be pledged hereunder with each
95 other, or the merger or consolidation of any one or more of said companies with some company or companies whose stock shall not prior to such merger be pledged hereunder, or the merger or consolidation of any one or more of such companies into or with the railroad company or into or with the railroad company and other companies; provided, always, that stock issued to the railroad company of any consolidated company formed by the merger or consolidation of any companies the capital stock of one or more of which is or shall be pledged hereunder, with each other, or with any company or companies whose stock shall not prior to such merger be pledged hereunder, shall be transferred to and deposited with the trustee hereunder, in lieu of the stock of the respective companies so merged or consolidated. In the case of a merger or consolidation into or with the Lehigh Valley Railroad Company, provision shall be made, if it shall be practicable so to do, for the lien of this mortgage to attach to the property or properties of the company or companies so merged or consolidated into or with the Lehigh Valley Railroad Company prior to any of the mortgages of the Lehigh Valley Railroad Company mentioned in section 5 of article 2 hereof. And it is further expressly understood that notwithstanding any other covenant or provision of this indenture, and for the full accomplishment of the purposes of any vote or power given as in this section permitted, the railroad company and any such other company severally and respectively, from time to time, may take any and all action authorized by any such vote or power.

SEC. 4. The trustee is authorized to cause to be registered in its name as trustee any and all coupon bonds having provision for registration which may be hereafter pledged at any time with it hereunder, or to cause the same to be exchanged, if practicable, for registered bonds of any denomination without coupons, or if the
96 railroad company shall, in writing, consent thereto to cause the same to be stamped "Not negotiable. Held by Girard Trust Company as trustee, under the mortgage of Lehigh Valley Railroad Company, dated September 30th, 1903." The trustee shall cause to be transferred into its name as trustee hereunder all registered bonds and all shares of stock which at any time may be delivered and assigned to it as security hereunder.

The trustee may do whatever it may deem necessary for the purpose of maintaining or preserving the corporate existence of any and all companies any of whose shares shall at any time be pledged hereunder, and for such purposes it may from time to time assign

and transfer so many shares of the stocks of the several companies as may be necessary to qualify persons to act as directors of or in any other official relation to said companies, and in all cases the trustee may make such arrangements as it shall deem necessary for the protection of the trusts hereunder.

SEC. 5. If any default shall be made in the payment of the principal or interest of any mortgage bonds at any time hereafter pledged hereunder, or of other bonds secured by the same mortgage as secures such bonds held by the trustee, then, in any such case, the trustee, upon the written request of the railroad company and upon being provided with the necessary funds or provided with satisfactory security for costs and expenses, shall cause proper proceedings to be instituted and prosecuted in some court of competent jurisdiction to foreclose the mortgage or mortgages by which such bonds are secured.

In case the railroad company shall be in default in the payment of the principal or interest of any of the bonds hereby secured, and such default shall have continued for a period of six months, or in case a receiver of the premises mortgaged hereby shall have been appointed, or in case the trustee shall have entered or shall have
97 elected to enter into possession of any such mortgaged premises under the power hereinafter conferred or by the voluntary action of the railroad company, then the trustee, in its discretion, may institute such proceedings of its own motion without such written request.

In case, at any time, any company of whose capital stock the greater part shall be held by the trustee hereunder shall be dissolved or liquidated, or in case all or any of the property of any such company shall be sold upon the insolvency of such company, at any judicial or other sale, or in case any property covered by a mortgage securing any bonds held by the trustee hereunder shall be sold to satisfy such mortgage, then (1), in any such case, if the property of such company or the property sold can be acquired by crediting on the bonds, claims, indebtedness or stock held by the trustee hereunder the amount accruing thereon out of the proceeds of such property, the trustee may, in its discretion and (2) in any case, if by the railroad company requested in writing, and by it provided with the necessary funds therefor, the trustee shall purchase or cause to be purchased such property, either in the name and on behalf of the railroad company or in its own name or by purchasing trustees, and shall use such bonds, claims, indebtedness, and stock to make payment for such property; and in case of any such purchase, the trustee shall take such proceedings as it may deem best to cause such property to be vested either in the railroad company, subject to the lien of this indenture, or in some other corporation organized, or to be organized, for that purpose, of whose bonded debt and capital stock all, excepting the amount thereof required to qualify directors, shall be received and held by the trustee, and shall be vested in the railroad company, subject to the lien of this indenture.

The railroad company covenants that, on demand of the trustee, it will forthwith pay or satisfactorily provide for all expendi-
98 tures incurred by the trustee under any of the provisions of this section, including all sums required to obtain and perfect the ownership and title to any properties which the trustee shall purchase or cause to be purchased pursuant to the provisions of this section; and, in case the railroad company shall fail so to do, then, without impairment of or prejudice to any of its rights hereunder by reason of the default of the railroad company, the trustee, in its discretion, may advance all such expenses and other moneys required, or may procure such advances to be made by others, and for such advances, made by the trustee, or by others at its request, with interest thereon, the trustee shall have a lien on the property hereby mortgaged and pledged, which lien shall be prior to the lien of the bonds hereby secured, but in no event shall the principal of such lien exceed, in the aggregate, at any one time, a sum equal to five per cent of the principal of the total amount of bonds issued hereunder and then outstanding.

In case the trustee shall not purchase or cause to be purchased the property sold at any such sale, and shall not join in a plan of reorganization as aforesaid in respect of such bonds or stock, the trustee shall receive any portion of the proceeds of the sale accruing on the securities by it held hereunder, and shall apply the same in the manner provided in article six hereof in respect of moneys arising from the sale of similar property released from the lien hereof as therein provided.

SEC. 6. Anything herein contained to the contrary notwithstanding the trustee may also in any of the cases herein stated or in any other case not specifically provided for in this instrument take such steps or assent to such action, in respect to any of the premises or property, real or personal, now or hereafter mortgaged or pledged hereunder as in the opinion of the railroad company expressed by resolution of the board of directors and in the discretion of the trustee shall be for the benefit of such premises and property or any part thereof, and for such purpose the trustee may join in any plan of reor-
99 ganization, or other action, or in any agreement approved by it, in respect of any such premises and property, and may accept any new securities representing any such premises and property issued under any such plan.

SEC. 7. The trustee, at any time in its discretion, may, and, if requested in writing by the railroad company, shall, consent to the extension of any bonds which hereafter shall be pledged with or assigned to the trustee hereunder, and of the mortgages securing the same, to the extent provided in sec. 9 of article two hereof; provided that such extended bonds shall be secured by a lien and charge upon the same property equal or superior to that of the bonds extended. The trustee may receive the certificate of counsel of the railroad company as conclusive evidence that such extended bonds are so secured.

ARTICLE FOUR.

SEC. 1. Neither any coupon belonging to any bond hereby secured, nor any claim for interest on any registered bond, which in any way, on or after the maturity thereof, shall have been transferred or pledged, separate and apart from the bond to which it relates, shall, unless accompanied by such bond, be entitled, in case of a default hereunder, to any benefit of, or from, this indenture, except after the prior payment in full of the principal of all bonds issued hereunder, and of all coupons and interest obligations not so transferred or pledged.

SEC. 2. In case (1) default shall be made in the payment of any interest on any bond at any time issued under and secured by this indenture, or on any bond mentioned in section 5 of article two hereof, and any such default shall continue for a period of six months; or in case (2) default shall be made in the due and punctual payment of the principal of any bond secured hereby or of any bond mentioned
100 in section 5 of article two hereof; or in case (3) default shall be made by the railroad company in the payment of any tax, assessment, or other governmental charge lawfully imposed or levied upon any part of the property and premises hereby mortgaged, or upon the income and profits thereof, and such default shall continue for a period of six months after written notice thereof from the trustee or from holders of five per cent in amount of the bonds hereby secured and then outstanding; or in case (4) the railroad company shall make default in the due observance and performance of any other covenant or condition herein contained, and any such default shall continue for a period of six months after written notice thereof to the railroad company from the trustee or from the holders of five per cent in amount of the bonds hereby secured and then outstanding; then, and in each and every such case of default (provided, however, in respect of any of the three cases so indicated, that such default shall have continued for six months as aforesaid), the trustee personally, or by its agent or agents, attorney or attorneys, may enter into and upon all or any part of the railroads, property, and premises, lands, rights, interests, and franchises hereby conveyed, or intended so to be, and each and every part thereof, and may exclude the railroad company, its agents and servants, wholly therefrom, and having and holding the same, may use, operate, manage, and control said premises, and conduct the business thereof, either personally or by its superintendents, managers, receivers, agents, and servants, or attorneys, to the best advantage of the holders of the bonds hereby secured in accordance with law and with any statute relating to said premises or any part thereof, or to the operation thereof; and, upon every such entry, the trustee, at the expense of the trust estate, from time to time, by purchase, repairs, or construction, may maintain and restore, and insure or keep insured, the railroads, property, buildings and structures erected or provided for use in connection with
101 said premises, and whereof it shall become possessed, as afore-

said, in the same manner and to the same extent as is usual, and likewise, from time to time, at the expense of the trust estate, may make all necessary or proper repairs, renewals, and replacements and useful alterations, additions, betterments, and improvements thereto and thereon; and the trustee in such case shall have the right to manage the mortgaged premises as aforesaid, and to carry on the business and exercise all rights and powers of the railroad company, either in the name of the railroad company, or otherwise, as the trustee shall deem best; and it shall be entitled to collect and receive all incomes, rents, issues, and profits of the same and every part thereof, and also the income from stocks and bonds pledged hereunder, and after deducting the expenses of operating said premises, and of conducting the business thereof, and of all repairs, maintenance, renewals, replacements, alterations, additions, betterments, and improvements, and all payments which may be made for taxes, assessments, insurance, and prior or other proper charges upon the said premises and property, or any part thereof, including any interest paid on bonds prior in lien to those secured hereby, as well as just and reasonable compensation for its own services and for all agents, clerks, servants, and other employees by it properly engaged and employed, it shall apply the moneys arising as aforesaid as follows:

In case the principal of the bonds hereby secured shall not have become due, to the payment of the interest remaining in default, in the order of the maturity of the installments of such interest, with interest thereon at the rate of five per cent per annum; such payments to be made ratably to the persons or parties entitled thereto, without discrimination or preference.

In case the principal of the bonds hereby secured shall have
102 become due by declaration or otherwise, first, to the payment of the accrued interest, with interest thereon at the rate of five per cent per annum, in the order of the maturity of the installments thereof, and, next, to the payment of the principal of all bonds hereby secured; in every instance such payments to be made ratably to the person or persons entitled to such payment without any discrimination or preference.

All the foregoing provisions are, however, subject to the provisions postponing the rights of holders of detached coupons and assignments of interest, not accompanied by the bond to which they relate.

In case, and during such continuance, of any such default in either of the first three cases specified in this section, either with or without entry by the trustee, and also in the fourth case, if the trustee shall have entered or shall have elected to enter as aforesaid, the trustee shall have, exercise, and enjoy the right to vote on all shares of stock pledged or agreed to be pledged hereunder, and, for the benefit of the holders of bonds hereby secured, the right to receive and collect all interest moneys and dividends maturing or payable upon all pledged bonds and stocks, and to apply as hereinbefore provided the net moneys received, and as holder of such shares of stock and of such

bonds that may be hereafter pledged under this indenture, to perform any and all acts, and to make or execute any and all requests, requisitions, or other instruments in the premises. In the event that a receiver of the hereby mortgaged premises shall have been appointed and shall be in possession thereof, the trustee, from time to time, in its discretion, may turn over any part or all of the interest moneys and dividends so collected by it, to such receiver, and may cooperate with such receiver in managing and operating the entire properties mortgaged or pledged hereunder in such manner as the trustee shall deem for the best interests of the holders of the bonds hereby secured.

103 SEC. 3. In case default shall be made by the railroad company in the payment of any interest on any bond hereby secured, and such default shall continue for a period of six months, then and in every case of such continuing default, upon the written request of the holders of a majority in amount of the bonds hereby secured then outstanding, the trustee, by notice in writing delivered to the railroad company, shall declare the principal of all bonds hereby secured then outstanding to be due and payable immediately, and upon any such declaration the same shall become and be immediately due and payable, anything in this indenture or in said bonds contained to the contrary thereof in anywise notwithstanding. This provision is, however, subject to the condition, that if at any time after the principal of said bonds shall have been so declared due and payable, all arrears of interest upon all such bonds, with interest at the rate of five per cent per annum on overdue instalments of interest, shall either be paid by the railroad company or be collected out of the mortgaged premises before any sale of the mortgaged premises shall have been made, then and in every such case the holders of a majority in amount of the bonds hereby secured then outstanding, by written notice to the railroad company and to the trustee, may waive such default and its consequences; but no such waiver shall extend to or affect any subsequent default, or impair any right consequent thereon.

In case the trustee shall have proceeded to enforce any right under this indenture by foreclosure, entry, or otherwise, and such proceedings shall have been discontinued or abandoned because of such waiver, or for any other lawful reason, or shall have been determined adversely to the trustee, then and in every such case, the railroad company shall be restored to its former position and rights hereunder in respect of the mortgaged premises and the shares of stock and bonds, and other property, herein pledged or agreed to be pledged;

104 and, upon its written request, the trustee shall do, make, execute, acknowledge and deliver such acts, deeds, instruments, and assurances in the law as may be required to effectuate such purpose; but, nevertheless, all rights, remedies, and powers of the trustee shall survive and continue as though no such proceedings had been taken.

SEC. 4. In case (1) default shall be made by the railroad company in the payment of any interest on any bond at any time issued under and secured by this indenture, or on any bond mentioned in section 5 of article two hereof, and any such default shall continue for a period of six months; or in case (2) default shall be made by the railroad company in the due and punctual payment of the principal of any bond secured hereby, or of any bond mentioned in section 5 of article two hereof; or in case (3) default shall be made by the railroad company in the payment of any tax, assessment, or other governmental charge lawfully imposed or levied upon any part of the property and premises hereby mortgaged or upon the income and profits thereof, and such default shall continue for a period of six months after written notice thereof to the railroad company from the trustee or from holders of five per cent in amount of the bonds hereby secured and then outstanding; or in case (4) the railroad company shall make default in the due observance and performance of any other covenant or condition herein contained, and any such default shall continue for a period of six months after written notice thereof to the railroad company from the trustee or from the holders of five per cent in amount of the bonds hereby secured and then outstanding; then, and in each and every such case of default (provided, however, in respect of any of the three cases so indicated, that such default shall have continued for six months as aforesaid), the trustee, with or without entry, personally or by attorney, in its discretion (a) may sell to the highest and best bidder, all and singular the mortgaged and pledged property and premises, bonds and stocks, rights, fran-
105 chises and interests, lands and appurtenances, and other real and personal property of every kind, and all right, title and interest, claim and demand therein, and right of redemption thereof, in one lot, as an entirety, provided, however, in respect of such lot that if a sale thereof in parcels shall be required under the provisions of section 6 of this article, sale may be made in parcels as in said section provided; which sale shall be made at public auction at such place in the city of Philadelphia, in the State of Pennsylvania, or at such other place, and at such time and upon such terms, as the trustee may fix and briefly specify in the notice of sale to be given as herein provided; or (b) immediately upon the expiration of the six months in any of the three cases so indicated, and immediately upon default in payment of principal in the other case, may proceed to protect and enforce the right of bondholders under this indenture, by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for the foreclosure of this indenture, or for the enforcement of any other appropiate legal or equitable remedy, as the trustee, being advised by counsel learned in the law, shall deem most effectual to protect and to enforce any of its rights or duties hereunder.

Upon the written request of the holders of twenty-five per cent in amount of the bonds hereby secured and then outstanding, in case

of any such default (continued in any of said three cases for six months as aforesaid), it shall be the duty of the trustee, upon being indemnified as hereinafter provided, to take all needful steps for the protection and enforcement of its rights and the rights of the bondholders secured hereby, and to exercise the powers of entry or sale herein conferred, or both, or to take appropriate judicial proceedings by action, suit or otherwise, as the trustee, being advised by counsel learned in the law, shall deem most expedient in the interest of the holders of the bonds hereby secured.

106 SEC. 5. Anything in this indenture contained to the contrary notwithstanding, the holders of seventy-five per cent in amount of the bonds hereby secured and then outstanding, in case of any subsisting default, from time to time, shall have the right to direct and control the method and place of conducting any and all proceedings for any sale of the property and premises hereby conveyed and pledged, or agreed or intended so to be, or for the foreclosure of this indenture, or for the appointment of a receiver, or for the purpose of taking any other proceedings hereunder.

SEC. 6. In the event of any sale, whether made under the power of sale hereby granted and conferred, or under or by virtue of judicial proceedings, or of some judgment or decree of foreclosure and sale, the whole of the property hereby mortgaged and pledged shall be sold as provided in section 4 of this article in one lot, as an entirety, including all the rights, title, estates, lands, rights to lands, railroads, equipment, franchises, leases, leasehold interests, contracts, stocks, bonds, and other real and personal property of every name and nature, unless the holders of a majority in amount of the bonds hereby secured then outstanding shall in writing request the trustee to cause the same to be sold in parcels, in which case the sale thereof shall be made in such parcels as may be specified in such request or petition, or unless such sale as an entirety is impracticable by reason of some statute or other cause; and this provision shall bind the parties hereto and each and every of the holders of the bonds and coupons hereby secured or intended so to be.

SEC. 7. Notice of any such sale pursuant to any provision of this indenture shall state the time and place when and where the same is to be made, and shall contain a brief general description of the property to be sold, and shall be sufficiently given if published once in each week for four successive weeks prior to such sale in a newspaper published in the city of New York, and in a newspaper published in the city of Philadelphia.

107 SEC. 8. Upon the completion of any sale or sales under this indenture the trustee shall make, execute, and deliver to the accepted purchaser or purchasers a good and sufficient deed or good and sufficient deeds of conveyance of the property and franchises sold. And the trustee and its successors are hereby appointed the true and lawful attorney or attorneys, irrevocable, of the railroad company in its name and stead to make all necessary deeds and conveyances of property and all necessary transfers of shares of stock

or bonds or other obligations thus sold, and for that purpose it and they may execute all necessary acts of assignment and transfer and may substitute one or more persons with like power, the railroad company hereby ratifying and confirming all that its said attorney or attorneys or such substitute or substitutes shall lawfully do by virtue hereof.

Any such sale or sales made under or by virtue of this indenture, whether under the power of sale hereby granted and conferred or under or by virtue of judicial proceedings, shall operate to divest all right, title, interest, claim, and demand whatsoever, either at law or in equity, of the railroad company of, in, and to the premises sold, and shall be a perpetual bar both at law and in equity against the railroad company, its successors and assigns, and against any and all persons claiming or to claim the premises sold, or any part or parcel thereof, by, from, through, or under the railroad company, its successors and assigns, or any of them.

The personal property and chattels conveyed or intended to be conveyed by or pursuant to this indenture, other than stocks, bonds, and other securities, and property pledged or to be pledged with the trustee, shall be real estate for all the purposes of this indenture, and shall be held and taken to be fixtures and appurtenances of the railroads and part thereof, and are to be used and sold therewith and not separate therefrom, except as herein otherwise provided.

108 SEC. 9. The trustee, from time to time, may adjourn any sale to be made by it under the provisions of this indenture by announcement at the time and place appointed for such sale or for such adjourned sale or sales; and without further notice or publication it may make such sale at the time and place to which the same shall be so adjourned.

SEC. 10. The receipt of the trustee shall be a sufficient discharge to the purchaser or purchasers of the property sold as aforesaid for the purchase money, and no such purchaser or purchasers, or his, their, or its representatives, vendees, grantees, or assigns, after paying such purchase money and receiving such receipt, shall be bound to see to the application of such purchase money upon or for any trust or purpose of this indenture, or in any manner whatsoever be answerable for any loss, misapplication, or nonapplication of any such purchase money or any part thereof, or be bound to inquire as to the authorization, necessity, expediency, or regularity of any such sale.

SEC. 11. In case of any such sale, whether under the power of sale hereby granted or pursuant to judicial proceedings, the whole of the principal sum of the bonds hereby secured, if not previously declared due, shall at once become due and payable, anything in said bonds or in this indenture to the contrary notwithstanding.

SEC. 12. The proceeds or avails of any such sale, whether under the power of sale hereby granted or pursuant to judicial proceedings, and the purchase money paid thereon, together with any sums which may be held by the trustee under any of the provisions of this

indenture, at the time of or after such sale, as part of the trust estate or the proceeds thereof, shall be applied as follows:

First. To the payment of the costs and expenses of such sale, including a reasonable compensation to the trustee, its agents, attorneys, and counsel, and of all expenses, liabilities, and advances
109 made and incurred by the trustee in managing and maintaining the property hereby conveyed or so intended to be, and of all taxes, assessments, or liens prior to the lien of these presents, except any taxes, assessments, or other superior liens to which such sales shall have been made subject.

Second. To the payment of the whole amount then owing or unpaid upon the bonds hereby secured for principal and interest, with interest at the rate of five per cent per annum on the overdue installments of interest, and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the said bonds, then to the payment of such principal, and interest, without preference or priority of principal over interest, or of interest over principal, or of any installment of interest over any other installment of interest, ratably, to the aggregate of such principal and the accrued and unpaid interest.

Third. To the payment of the surplus, if any, to the railroad company, or to whomsoever may be lawfully entitled to receive the same.

All the foregoing provisions are, however, subject to the provisions postponing the rights of holders of detached coupons and assignments of interest not accompanied by the bond to which they relate.

SEC. 13. The railroad company covenants that in case (1) default shall be made in the payment of any interest on any bonds at any time outstanding and secured by this indenture, or in case (2) default shall be made in the payment of the principal of any such bonds when the same shall become payable, whether at the maturity of said bonds or by declaration as authorized by this indenture, or by a sale of the mortgaged premises as hereinbefore provided, then, upon demand of the trustee, it will pay to the trustee the whole
110 amount of the interest, or of the interest and principal, due and payable on all the bonds hereby secured then outstanding, with interest at the rate of five per cent per annum upon the overdue principal and installments of interest; and in case it shall fail to pay the same, forthwith, upon such demand, the trustee in its own name and as trustee of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.

The trustee shall be entitled to recover judgment as aforesaid, either before or after, or during the pendency of any proceedings for the enforcement of the lien of this indenture upon the mortgaged and pledged premises, and the right of the trustee to recover such judgments shall not be affected by any entry or sale hereunder, or by the exercise of any other right, power, or remedy for the enforcement of the provisions of this indenture or the foreclosure of the lien thereof; and in case of a sale of the mortgaged premises and of the application of the proceeds of sale to the payment of the mortgage

debt, the trustee, in its own name and as trustee of an express trust, shall be entitled to enforce payment of, and to receive, all amounts then remaining due and unpaid upon any and all of the bonds issued hereunder and then outstanding, for the benefit of the holders thereof, and shall be entitled to recover judgment for any portion of the mortgage debt remaining unpaid, with interest. No recovery of any such judgment by the trustee and no levy of any execution upon any such judgment upon property subject to the lien of this indenture, or upon any other property, shall in any manner, or to any extent, affect the lien of the trustee upon the mortgaged premises or any part thereof, or any rights, powers, or remedies of the trustee hereunder, or any rights, powers, or remedies of the holders of the bonds hereby secured, but such lien, rights, powers, and remedies shall continue unimpaired as before.

Any moneys collected by the trustee under this section shall
111 by it be distributed and paid over to the persons registered as holders of the registered coupon bonds and registered bonds without coupons at the time of payment, and to the persons presenting the coupon bonds and coupons for such payment, without any preference or priority of any kind and ratably according to the amounts which shall have become due upon such bonds and coupons respectively.

SEC. 14. The railroad company will not, at any time insist upon or plead, or in any manner whatever claim, or take the benefit or advantage of, any stay or extension law now or at any time hereafter in force in any locality where the mortgaged premises or pledged property, or any part of either, may or shall be situate, nor will it claim, take, or insist on any benefit or advantage from any law now or hereafter in force, providing for the valuation, or appraisement, of the mortgaged premises, or pledged property, or any part thereof, prior to any sale or sales thereof to be made pursuant to any provision herein contained, or prior to the decree of any court of competent jurisdiction; nor after any such sale or sales will it claim or exercise any right under any statute enacted by the Congress of the United States, or by the legislature of any State, to redeem the property so sold or any part thereof; and it hereby expressly waives all benefit and advantage of any such law or laws; and it covenants that it will not hinder, delay, or impede the execution of any power herein granted and delegated to the trustee, but that it will suffer and permit the execution of every such power, as though no such law or laws had been made or enacted.

SEC. 15. Upon filing a bill in equity or upon commencement of any other judicial proceedings to enforce any right of the trustee or of the bondholders under this indenture, the trustee shall be entitled to exercise the right of entry herein conferred, and also any and all other rights and powers herein and hereby conferred and pro-
112 vided to be exercised by the trustee upon the occurrence and continuance of default as hereinbefore provided; and, in any

case of any default entitling the trustee to enter as provided in section 2 of this article, the trustee, as matter of right, shall be entitled to the appointment of a receiver of the premises hereby mortgaged, and of the earnings, income, revenue, rents, issues, or profits thereof, with such powers as the court making such appointment shall confer; but, notwithstanding the appointment of any receiver, the trustee shall be entitled, as pledgee, to continue to retain possession and control of the stocks, bonds, cash, and other property pledged or to be pledged with the trustee hereunder.

SEC. 16. The railroad company at any time hereafter, before full payment of the bonds secured hereby, and whenever deemed expedient for the better security of such bonds, although there be then no default entitling the trustee to enter into possession, may, with the consent of the trustee, surrender and deliver to the trustee full possession of the whole or any part of the property, premises, and interests by it hereby conveyed, or intended so to be, for any period, fixed or indefinite. Upon such surrender and delivery to the trustee, with its consent, the trustee shall enter into and upon the premises so surrendered and delivered, and shall take and receive possession thereof, for such period, fixed or indefinite, as aforesaid, without prejudice, however, to its right at any time subsequently, when entitled thereto by any provision hereof, to insist upon and to maintain such possession though beyond the expiration of any such prescribed period. Upon any such voluntary surrender and delivery of said property and premises, or any part thereof, the trustee, from the time of its entry shall work, maintain, use, manage, control, and employ the same in accordance with the provisions of this indenture, and shall receive and apply the income and revenue thereof as provided in section 2 of this article. Upon application of the trustee, and
113 with consent of the railroad company if there be then no subsisting default hereunder, and without such consent if there shall then be a subsisting default entitling the trustee to enter as provided in section 2 of this article hereof, a receiver may be appointed to take possession of, and to operate, maintain, and manage the whole or any part of said property wheresoever the same may be situated, with all the rights, powers, and duties by this section conferred upon the trustee, and the railroad company shall transfer and deliver to such receiver all such property in its possession wheresoever the same may be situated; provided, however, that notwithstanding the appointment of any such receiver, the trustee, as pledgee, shall be entitled to retain possession and control of the stocks, bonds, cash, and other property pledged or to be pledged with the trustee hereunder.

SEC. 17. No holder of any bond or coupon hereby secured shall have any right to institute any suit, action, or proceeding in equity or at law for the foreclosure of this indenture or for the execution of any trust hereof, or for the appointment of a receiver, or for any other remedy hereunder, unless such holder shall previously have given to the trustee written notice of default and of the continuance thereof as

hereinbefore provided, nor unless, also, the holders of twenty-five per cent in amount of the bonds hereby secured and then outstanding shall have made written request of the trustee, and shall have afforded to it reasonable opportunity, either itself to proceed to exercise the powers hereinbefore granted, or to institute such action, suit, or proceeding in its own name, nor unless, also, they shall have offered to the trustee adequate security and indemnity against the cost, expenses, and liabilities to be incurred therein or thereby; and such notification, request, and offer of indemnity are hereby declared in every such case, at the option of the trustee, to be conditions precedent to the
114 execution of the powers and trusts of this indenture and to any action, or cause of action, for foreclosure or for the appointment of a receiver, or for any other remedy hereunder; it being understood and intended that no one or more holders of bonds and coupons shall have any right in any manner whatever to affect, disturb, or prejudice the lien of this indenture by his or their action, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings at law or in equity shall be instituted, had, and maintained in the manner herein provided and for the equal benefit of all holders of such outstanding bonds and coupons.

SEC. 18. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the trustee, or upon or to the holders of bonds hereby secured, is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative, and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute.

SEC. 19. In case of any sale hereunder any and all purchasers in making settlement or payment shall be entitled to turn in any bonds and any matured and unpaid interest obligations hereby secured, estimating the value of such bonds and coupons for that purpose at the sum payable out of the net proceeds of such sale to the holder or holders of such bonds and coupons as his or their ratable share of such net proceeds, after allowing for the proportion of the total payment required to be made in cash for the costs and expenses of the sale or otherwise; and if such share of net proceeds shall be less than the amount then due upon such bonds and coupons, such purchaser or purchasers may make such settlement by receipting on the bonds the amount to be credited thereupon; and at any such sale any bondholders may bid for and purchase such property, and, upon compliance with the terms of sale, may hold, retain, and dispose of such property without further accountability therefor.

115 SEC. 20. No delay or omission of the trustee, or of any holder of bonds hereby secured, to exercise any right or power accruing upon any default continuing as aforesaid shall impair any such right or power, or shall be construed to be a waiver of any such default, or an acquiescence therein.

SEC. 21. If, in order to preserve the franchises of the railroad company, and to avoid a sale hereunder, any plan of reorganization shall be proposed with provisions for the modification of this mortgage, so

far as to authorize and require the creation of new liens upon the mortgaged premises prior and superior to the lien hereof, then and in every such case registered holders of four-fifths in amount of all outstanding bonds hereby secured, may, in writing, direct the trustees, in behalf of all the holders of all bonds then or thereafter issued hereunder, to acquiesce in the provisions of such plan; which plan also may determine and provide for the interests of other creditors and lienors and of the shareholders of the railroad company. This special power, however, is granted to the registered holders of four-fifths in amount of the bonds upon the express condition that no bond hereby secured and then outstanding shall be changed as to amount or date of payment of principal or rate or dates of payment of interest. Thereupon, but not otherwise, the trustee shall by writing acquiesce in such provisions of such plan and such acquiescence by the trustee shall constitute the irrevocable assent of all holders of bonds and coupons hereby secured to any such accepted modifications, as set forth in such plan and necessary to give effect to such provisions thereof. All such modifications so affecting this indenture and the bonds and coupons hereby secured shall be reduced to a written agreement between the railroad company and the trustee, and such agreement shall be recorded in Philadelphia County, Pennsylvania; and thenceforth shall be deemed to be part of this indenture, and thereafter the lien of this indenture and of the bonds hereby secured, shall be
116 deemed to be and shall be subordinate to such new and prior liens created pursuant to such plan, but only to the extent specified in such written agreement.

Registration of bonds for any purpose of this section shall be sufficient if then or theretofore made and then continuing in any manner permitted by section 4 of article two of this indenture.

Article five.

Sec. 1. Any request or other instrument required by this indenture to be signed and executed by bondholders may be in any number of concurrent instruments of similar tenor, and may be signed or executed by such bondholders in person or by agent appointed in writing. Proof of the execution of any such request or other instrument, or of a writing appointing any such agent, and of the holding by any person of coupon bonds transferable by delivery, shall be sufficient for any purpose of this indenture, if made in the following manner:

The fact and date of the execution by any person of any such request, or other instrument of writing, may be proved by the certificate of any notary public, or other officer authorized to take acknowledgments of deeds to be recorded in Pennsylvania, that the person signing such request or other instrument acknowledged to him the execution thereof, or by an affidavit of a witness of such execution.

The amount of coupon bonds transferable by delivery, held by any person executing any such request or other instrument as the holder of bonds, and the issue numbers of the bonds held by such person, and

the date of his holding the same, may be proved by a certificate executed by any trust company, bank, bankers, or other depositary (wherever situated), whose certificate may be deemed by the trustee to be satisfactory, showing that such person had on deposit with such depositary the bonds described in such certificate at the
117 date therein mentioned. The ownership of registered coupon bonds or of registered bonds without coupons shall be proved by the registers of such bonds as provided in section 4 of article two hereof.

Such proof shall be conclusive in favor of the trustee with regard to any action taken by it under such request or other instrument.

ARTICLE SIX.

SEC. 1. Upon the written request of the railroad company, approved by resolution of its board of directors or executive committee, from time to time, while the railroad company, not being in any default hereunder, is in possession of the mortgaged premises, but subject to the conditions and limitations in this section prescribed, and not otherwise, the trustee, by proper instruments of writing, shall release from the lien and operation of this indenture any part of the premises and property, real or personal, now or hereafter mortgaged or pledged hereunder, except any of the shares of stock mentioned in I of subdivision third of the granting clauses hereof, and except also any shares of stock that may hereafter be pledged hereunder, and at the time of pledge classified, with the approval of the trustee under said I, but no release of stocks pledged hereunder shall be made except upon the redemption thereof as hereinafter provided.

No release hereunder of real estate shall be made unless the railroad company shall have sold, or shall have contracted to sell or to exchange for other property, the property so to be released.

The railroad company shall have the right at any time and from time to time to redeem from the lien hereof any or all of the shares of stock mentioned in II of subdivision third of the granting clauses hereof or hereafter pledged hereunder, and at the time of pledge classified with the approval of the trustee, under said II, and any or all bonds hereafter pledged hereunder, at prices which, in its discretion, the trustee shall approve; provided, that in the case
118 of the alienation of the said shares of stock, the railroad company and the trustee, in the discretion of the trustee, shall be of the opinion that the alienation of such stocks on the terms proposed will not be detrimental to the security of the bonds issued hereunder and secured hereby; and such redemption may be made either in money or in bonds hereby secured at the par value thereof, with five per cent premium added thereto, and for the purpose of any such redemption the railroad company may use any of the bonds hereby secured when duly issued or re-issued hereunder and held or acquired by it from time to time. All of said bonds hereby secured so applied

in redemption of securities shall thereupon be cancelled by the trustee, and, when cancelled, shall be surrendered to the railroad company.

The railroad company shall have the right at any time to exchange for other stocks the stocks named in II of subdivision third of the granting clauses hereof or hereafter pledged hereunder and at the time of pledge classified with the approval of the trustee under said II, provided such exchange shall be approved by the trustee, and the stock received by way of exchange shall be deposited and pledged with the trustee of this mortgage and classified under II.

The trustee shall deliver to the railroad company, with all rights unimpaired, any stock or bonds so redeemed from the lien hereof by the railroad company, and shall execute and deliver all proper instruments of transfer and assignment in respect thereof.

SEC. 2. The proceeds of any and all such sales of property, or of stocks or bonds pledged hereunder, and also all moneys received as compensation for any such property subject to this indenture taken by exercise of the power of eminent domain, may be disposed of as required by any mortgage thereon or pledge thereof prior hereto, and the trustee may acquiesce in such disposition. So far as
119 such proceeds and moneys shall not be disposed of pursuant to any such requirement, they shall be set apart and, at the option of the railroad company, shall be applied, either (1) to the purchase of bonds hereby secured in such manner and at such prices as the railroad company and the trustee shall deem expedient (including bonds held or acquired by the railroad company, from time to time), all of which bonds so applied in disposition of proceeds of sale as aforesaid shall thereupon be cancelled by the trustee, and when cancelled shall be surrendered to the railroad company, and to the extent that bonds hereby secured can not be bought on terms deemed expedient by the railroad company and the trustee, then to the purchase of securities in which at such time savings banks shall be authorized under the laws of Pennsylvania to invest their funds, such securities to be held by the trustee as a part of the trust estate hereunder, and the interest thereon or income therefrom, to be paid to the railroad company; or (2), to the improvement of, or additions to, any part of the mortgaged premises of the railroad company, or of the premises of any company, the entire capital stock (or in the opinion of the trustee substantially the entire capital stock) of which shall, at the time, be pledged hereunder, or to the purchase of other property, real or personal, by the railroad company, or by any such other company, or to the purchase by the railroad company of stocks or bonds of other companies, which shall be assigned in trust by the railroad company to the trustee, subject to all the trusts hereby declared, and shall be classified under I or II of subdivision third of the granting clauses hereof as the trustee shall approve. And if such proceeds and money shall have been applied, under (1) hereof, to the purchase of securities in which at such time savings banks shall be authorized under the laws of Pennsylvania to invest their funds, the trustee shall at

120 any time or times on the request of the railroad company, sell such securities at prices satisfactory to the trustee, and apply the proceeds as above provided under (2) of this section. Any new property acquired by the railroad company to take the place of any property released hereunder, shall ipso facto become and be subject to the lien of this indenture, as fully as if hereby specifically mortgaged, but, if requested by the trustee, the railroad company will convey or assign the same to the trustee by appropriate instruments upon the trusts and for the purposes of this indenture.

SEC. 3. The railroad company, from time to time, while in possession of the mortgaged premises as provided in article nine hereof, and not being in default hereunder, shall have full power, in its discretion, to dispose of any portion of the machinery, equipments and implements, at any time held or acquired, which may have become unfit for use, or unnecessary, replacing the same so far as may be necessary by new machinery, equipments or implements, which immediately, upon such acquisition, shall become subject to the lien and operation of this indenture, and the railroad company may, notwithstanding anything herein contained, consent to such disposition by any of the companies whose stocks are at the time pledged hereunder, of like property of such companies.

In no event shall any purchaser or purchasers of any property sold or disposed of under any provision of this article of this indenture be required to see to the application of the purchase money.

In case any portion of the mortgaged or pledged premises shall be in the possession of a receiver lawfully appointed, the powers in and by this article conferred upon the railroad company may be exercised by such receiver with the approval of the trustee; and if the trustee shall be in possession of the mortgaged or pledged premises under any provision of this indenture, then all the powers by this article conferred upon the railroad company may be exercised by the trustee in its discretion.

121 SEC. 4. In case at any time it shall become necessary, or in the judgment of the trustee shall be for the interest of the bondholders hereby secured, or for the benefit of the mortgaged property, that the railroad company shall terminate or renew or shall make changes or alterations in or a substitution of any of the leases embraced in the granting clauses of this mortgage, the railroad company with the written consent of the trustee may make any such terminations, renewals, changes, alterations or substitutions, and may make or cause to be made, executed and delivered all such instruments in writing as may be proper and necessary to carry out and perfect any and all terminations, renewals, changes, alterations or substitutions authorized in this section. At the same time provision shall be made by instruments in writing satisfactory to the trustee so that any renewed, changed, altered, or substituted leases shall forthwith become bound by and be subject to the terms of this indenture in the same manner as the original lease.

ARTICLE SEVEN.

SEC. 1. The trustee shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof, if such agent or attorney shall have been selected with reasonable care; or for anything whatever, in connection with this trust, except its own wilful misconduct or gross negligence. The trustee shall not be personally liable for any debts contracted by it or for damages to persons or property carried or injured, or for salaries or nonfulfilment of contracts, during any period wherein the trustee shall manage the trust property or premises upon entry or voluntary surrender as aforesaid. The trustee shall not be under any obligation to take any action towards the execution or enforcement of the trust hereby created, which, in its opinion, shall be likely to involve it in expense or liability, unless and as often as required by the trustee, the trustee shall be furnished with reasonable indemnity against
122 such expense or liability; nor shall the trustee be required to take notice of any default hereunder unless notified in writing of such default by the holders of at least five per cent in amount of the bonds hereby secured then outstanding, or to take any action in respect of any default unless requested in writing to take such action by the holders of not less than twenty-five per cent in amount of the bonds hereby secured then outstanding, and tendered reasonable indemnity as aforesaid, anything herein contained to the contrary notwithstanding; but neither any such notice or request, nor this provision therefor, shall restrict any discretion herein given to the trustee to determine whether or not it shall take action in respect of such default, or to take action without such request. The trustee shall not be responsible for the recording of this indenture.

The trustee shall be entitled to reasonable compensation for all services rendered by it in the execution of the trusts hereby created.

SEC. 2. The trustee, or any trustee hereafter appointed, may resign and be discharged of the trusts created by this indenture by giving notice thereof to the railroad company and to the bondholders through publication at least twice a week for four successive weeks, in one newspaper at that time published in the city of New York, and in one newspaper published in the city of Philadelphia, and by due execution of the conveyances hereinafter required.

The trustee may be removed at any time by an instrument or concurrent instrument in writing delivered to it signed by the holders of three-quarters in amount of the bonds secured hereby and then outstanding, or by their attorneys in fact duly authorized.

SEC. 3. In case at any time the said trustee, or any trustee hereafter appointed, shall resign or be removed or otherwise become incapable of acting, a successor, or successors, may be appointed by the holders of a majority in amount of the bonds hereby secured and then outstanding, by an instrument or concurrent instruments in
123 writing signed by such bondholders or their attorneys in fact duly authorized; provided, nevertheless, and it is hereby agreed

and declared that, in case at any time there shall be a vacancy in the office of trustee hereunder, the railroad company, by an instrument executed by order of its board of directors, may appoint a trustee to fill such vacancy until a new trustee shall be appointed by the bondholders as herein authorized. The railroad company shall thereupon publish notice of such appointment once a week for six successive weeks in a newspaper published in the city of New York, and in a newspaper published in the city of Philadelphia, and any new trustee so appointed by the railroad company shall immediately and without further act be superseded by a trustee appointed in the manner above provided by the bondholders prior to the expiration of ninety days after such publication of notice. In case no such appointment shall be made by the bondholders prior to the expiration of such ninety days, a new trustee, to supersede the trustee appointed by the railroad company, may nevertheless be appointed by any judge of the United States Circuit Court for the Third Circuit, or by any court of competent jurisdiction in the premises, upon the application of one-quarter in amount of the bondholders. Every such trustee appointed in place of Girard Trust Company, Philadelphia, or its successor in the trust, shall always be a trust company in good standing, doing business in the city of Philadelphia or in the city of New York, and having a capital and surplus aggregating at least $2,000,000, if there be such a trust company willing and able to accept the trust upon satisfactory terms.

Any new trustee appointed hereunder shall execute, acknowledge, and deliver to the trustee last in office and also to the railroad company an instrument accepting such appointment hereunder, and thereupon such new trustee shall become vested with all the estates, properties, rights, powers, and trusts of its or his predecessor
124 in the trust hereunder with like effect as if originally named as trustee herein, without any further act, deed, or conveyance; the trustee ceasing to act shall, on the written request of the new trustee, execute and deliver an instrument transferring to such new trustee, upon the trusts herein expressed, all the estates, properties, rights, powers, and trusts of the trustee so resigning or removed, and shall duly assign, transfer, and deliver any and all stocks, bonds, or other property and moneys held by such trustee to the new trustee so appointed in its or his place.

Should any deed, conveyance, or instrument in writing from the railroad company be required by any new trustee for more fully and certainly vesting in and confirming to such new trustee such estates, rights, powers, and trusts, any and all such deeds, conveyances, and instruments in writing shall, on due request, be made, executed, acknowledged, and delivered by the railroad company.

Article eight.

Sec. 1. No recourse under any obligation, covenant, or agreement of this indenture, or of any bond or coupon hereby secured, shall be had against any incorporator, stockholder, officer, or director of the

railroad company or of any successor corporation, either directly or through the railroad company, by any assessment or by any legal or equitable proceeding by virtue of any statute or otherwise, it being expressly agreed and understood that this mortgage and the obligations hereby secured are solely corporate obligations and that no personal liability whatever shall attach to or be incurred by the incorporators, stockholders, officers, or directors of the railroad company or of any successor corporation or any or either of them, under or by reason of any or either of the obligations, covenants, or agreements in this indenture, or in any of the bonds or coupons hereby secured, expressed, and contained or that may be implied therefrom, and that any and all personal liability, if any there should be, of every name and nature, either at common law or in equity, or by existing or future statutes, of every such incorporator, stockholder, officer, or director, is hereby expressly waived as a condition of and consideration for the execution and issue of this mortgage and such bonds and coupons.

ARTICLE NINE.

SEC. 1. Until some default shall have been made in the due and punctual payment of the interest or of the principal of the bonds hereby secured, or of some part of such interest or principal, or in the due and punctual performance and observance of some covenant or condition hereof obligatory upon the railroad company, and until such default shall have continued beyond the period of grace, if any, herein provided in respect thereof, or until the railroad company voluntarily shall have surrendered possession to the trustee as herein permitted, the railroad company, its successors and assigns, shall be suffered and permitted to retain actual possession of all the premises hereby mortgaged (other than the bonds, certificates of stock, cash, and other property pledged or to be pledged hereunder with the trustee), and the same and every part thereof, with the rights and franchises appertaining thereto, and the tolls, income, rents, issues, and profits thereof, to manage, operate, collect, receive, use, and enjoy in any manner not inconsistent with the provisions hereof.

SEC. 2. If at any time, under the provisions hereof, the entire amount of the bonds and coupons hereby secured shall have been acquired by the railroad company, or if when the bonds hereby secured shall have become due and payable the railroad company shall well and truly pay, or cause to be paid, the whole amount of the principal moneys and interest due upon all the bonds and coupons for interest thereon hereby secured then outstanding, or shall provide for such payment by depositing with the trustee hereunder for the payment of such bonds and coupons the entire amount due thereon for principal and interest, and shall also pay, or cause to be paid, all other sums payable hereunder by the railroad company, and shall well and truly perform all the things herein required to be performed by it according to the true intent

and meaning of this indenture, then all property, rights and interest hereby conveyed or pledged shall revert to the railroad company, and the estate, right, title and interest of the trustee shall thereupon cease, determine and become void, and the trustee in such case, on demand of the railroad company, and at its cost and expense, shall assign and deliver to the railroad company all stocks, bonds and other property pledged with or held by said trustee and shall enter satisfaction of this indenture and of any conveyances made in trust to it, pursuant to this indenture, upon the records; otherwise the same shall be, continue and remain in full force and virtue.

ARTICLE TEN.

SEC. 1. All the covenants, stipulations, promises and agreements in this indenture contained, by or in behalf of the railroad company, shall bind not only it but also its successors or assigns, whether so expressed or not.

SEC. 2. Nothing contained in this indenture, or in any bond hereby secured, shall prevent the railroad company from entering into any lawful consolidation or merger with, or any lease to, any other corporation or corporations, or any conveyance and transfer (subject to the continuing lien of this indenture and to all the provisions thereof), of all the hereby mortgaged and pledged premises as an entirety to a corporation at that time existing under and by virtue of the laws of the United States or any State thereof, and lawfully entitled to acquire the property affected by this mortgage;
127 provided, however, that such consolidation, merger, lease or sale shall not impair the lien and security of this indenture, or any of the rights or powers of the trustee, or of the bondholders hereunder, and that, upon any such consolidation, merger, lease or sale, the due and punctual payment of the principal and interest of all said bonds according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this indenture, shall be assumed by any corporation formed by such consolidation or merger, or leasing or purchasing as aforesaid.

SEC. 3. In case the railroad company, pursuant to sec. 2 of this article, shall be consolidated or merged with any other corporation, or shall sell, convey and transfer, subject to this indenture, all its mortgaged and pledged premises as an entirety as aforesaid, every successor corporation formed by such consolidation or into which the railroad company shall have been merged, or which shall have purchased and received any conveyance and transfer as aforesaid, shall, upon executing and causing to be recorded an indenture with the trustee, satisfactory to the trustee, whereby such successor corporation shall assume the due and punctual payment of the principal and interest of the bonds hereby secured, and the performance of all the covenants and conditions of this indenture, succeed to, and be substituted for, the railroad company, party of the first part hereto, with the same effect as if it had been named herein as party of the

first part hereto, and every such successor corporation may thereupon cause to be signed and may issue, either in its own name or in the name of the railroad company, any or all of such bonds which shall not theretofore have been signed by the railroad company and delivered to the trustee, and, subject to all the terms, conditions and restrictions herein prescribed, the trustee shall certify and deliver any of such bonds which shall have been previously signed and delivered by the officers of the railroad company to the trustee
128 for certification, and any of such bonds which such successor corporation shall, as above provided, thereafter cause to be signed and delivered to the trustee for that purpose upon the order of such successor corporation. All bonds so issued shall in all respects have the same legal rank and security as the bonds theretofore or thereafter issued in accordance with the terms of this indenture, as though all of said bonds had been issued at the date of the execution hereof.

SEC. 4. For every purpose of this indenture, including the execution, issue and use of any and all bonds hereby secured, the term "Lehigh Valley Railroad Company" includes and means not only the corporation of that name, party of the first part hereto, but also any such successor corporation, as provided in sec. 3, now existing or hereafter formed under the laws of the United States or of any State or States thereof. Every such successor corporation shall possess and from time to time may exercise each and every right and power hereunder of Lehigh Valley Railroad Company in its name or otherwise.

SEC. 5. Any act or proceeding by any term of this indenture, or of any bond or resolution herein recited, required or provided to be done or performed by any board or officer of the railroad company, shall and may, in event of any change in its corporate existence, be done and performed with like force and effect by the like board or officer of any corporation that shall at the time be lawful sole successor of the railroad company.

SEC. 6. Nevertheless, before the exercise of the powers conferred by this article, the railroad company, by instrument in writing executed by authority of its board of directors and delivered to the trustee, may surrender any of the powers reserved to the railroad company or to such successor corporation under this article, and thereupon such power so surrendered shall terminate.

129 ARTICLE ELEVEN.

SEC. 1. The railroad company may deem and treat the registered holder of any registered bond without coupons, or of any registered coupon bond, or the bearer of any coupon bond hereby secured which shall not at the time be registered, as hereinbefore authorized, and the bearer of any coupon for interest on any such bond, whether such bond shall be registered or not, as the absolute owner of such bond

or coupon, as the case may be, for the purpose of receiving payment of the interest or principal of such bond, or the amount of such coupon, and for all other purposes, and the railroad company shall not be affected by any notice to the contrary.

ARTICLE TWELVE.

SEC. 1. Girard Trust Company, trustee, party hereto of the second part, hereby accepts the trusts in this indenture declared and provided, and agrees to perform the same upon the terms and conditions hereinbefore set forth.

The words "the trustee," or "said trustee," or any other equivalent term, as used in this indenture (except when otherwise clearly indicated), shall be held and construed to mean the trustee, or trustees, for the time being, whether original or successor, and the words "trustee," "bond," "coupon," "bondholder," and "holder" shall include the plural as well as the singular number, and the terms "majority" and "per cent" shall signify "majority in amount," or "per cent in amount," whether or not so expressed.

In order to facilitate the record of this indenture, the same may be simultaneously executed in several counterparts, each of which so executed shall be deemed to be an original; and such counterparts shall together constitute but one and the same instrument.

Lehigh Valley Railroad Company doth hereby constitute and
130 appoint D. G. Baird to be its attorney for it and in its name and as and for its corporate act and deed to acknowledge this mortgage before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment, to the intent that the same may be duly recorded.

Girard Trust Company doth hereby constitute and appoint Samuel W. Morris to be its attorney for it and in its name and as and for its corporate act and deed to acknowledge this mortgage before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment, to the intent that the same may be duly recorded.

131 In witness whereof, Lehigh Valley Railroad Company, the party thereto of the first part, has caused this indenture to be signed by its , and its corporate seal to be hereunto affixed, and the same to be attested by the signature of its secretary; and Girard Trust Company, the party of the second part, has caused this indenture to be signed by its , and its corporate seal to be hereunto affixed and the same to be attested by the signature of its secretary, the day and year first above written.

LEHIGH VALLEY RAILROAD COMPANY,
By E. B. THOMAS, *President.*

Attest:
D. G. BAIRD, *Secretary.*
[Seal of the Lehigh Valley Railroad Co.]

Signed, sealed, and delivered on behalf of Lehigh Valley Railroad Company in the presence of—
D. G. BAIRD,
HENRY S. DRINKER,
J. WM. ROBBINS.

GIRARD TRUST COMPANY,
By E. B. MORRIS, *President.*

Attest:
E. S. PAGE, *Secretary.*

[Seal of the Girard Trust Co.]

Signed, sealed, and delivered on behalf of Girard Trust Company in the presence of—
W. N. ELY,
W. J. DICKSON,
E. S. PAGE.

132 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

I hereby certify that on this 30th day of September, in the year of our Lord one thousand nine hundred and three (1903), before me, the subscriber, a notary public in and for the State and county aforesaid, personally appeared D. G. Baird, the attorney named in the foregoing mortgage, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said mortgage to be the act of the said Lehigh Valley Railroad Company.

Witness my hand and notarial seal the day and year aforesaid.

J. WM. ROBBINS,
[Seal of J. Wm. Robbins, notary public.] *Notary Public.*
My commission expires March 4th, 1907.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

I hereby certify that on this thirtieth day of September, in the year of our Lord one thousand nine hundred and three (1903), before me, the subscriber, a notary public, in and for the State and count yaforesaid, personally appeared Samuel W. Morris, the attorney named in the foregoing mortgage, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said mortgage to be the act of the said Girard Trust Company.

Witness my hand and notarial seal the day and year aforesaid.

WILLIAM J. DICKSON,
[Seal of William J. Dickson, notary public.] *Notary Public.*
Commission expires May 12th, 1905.

I am not a stockholder, director, or clerk in the corporation for which I hereby act as notary public.

133 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On the 30th day of September, in the year 1903, before me, personally came D. G. Baird, to me known, who, being by me duly sworn, did depose and say that he resided in the city of Beverly and State of New Jersey; that he is the secretary of Lehigh Valley Railroad Company, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

J. WM. ROBBINS,
Notary Public.

[Seal of J. Wm. Robbins, notary public.]
My commission expires March 4th, 1907.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On the thirtieth day of September, in the year 1903, before me, personally came E. B. Morris, to me known, who, being by me duly sworn, did depose and say that he resided in the county of Montgomery and State of Pennsylvania; that he is the president of Girard Trust Company, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

WILLIAM J. DICKSON,
Notary Public.

[Seal of William J. Dickson, notary public.]
Commission expires May 12, 1905.

134 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Be it remembered, that on this thirtieth day of September, A. D. before me, the subscriber, a notary public in and for the State and county aforesaid, personally appeared David G. Baird, who, being by me duly sworn, does depose and make proof to my satisfaction, that he is the secretary of Lehigh Valley Railroad Company, party to the foregoing mortgage; that he well knows the corporate seal of the said Lehigh Valley Railroad Company; that the seal thereto affixed is the proper corporate seal of the said company; that the same was so affixed thereto, and the said mortgage signed and delivered by E. B. Thomas, who was, at the date and execution thereof, the president of the said company, in the presence of deponent, as the voluntary act and deed of the said company; and that deponent thereupon signed the same as subscribing and attesting witness.

G. D. BAIRD.

Subscribed and sworn to before me, the day and year last above written.

J. WM. ROBBINS,
Notary Public.

[Seal of J. Wm. Robbins, notary public.]
My commission expires March 4th, 1907.

135 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Be it remembered, that on this thirtieth day of September, A. D., 1903, before me, the subscriber, a notary public in and for the State and county aforesaid, personally appeared E. S. Page, who, being by me duly sworn, does depose and make proof to my satisfaction, that he is the secretary of Girard Trust Company, party to the foregoing mortgage; that he well knows the corporate seal of the said Girard Trust Company; that the seal thereto affixed is the proper corporate seal of the said company; that the same was so affixed thereto, and the said mortgage signed and delivered by E. B. Morris, who was, at the date and execution thereof, the president of the said company, in the presence of deponent, as the voluntary act and deed of the said company; and that deponent thereupon signed the same as subscribing and attesting witness.

E. S. PAGE.

Subscribed and sworn to before me the day and year last above written.

WILLIAM J. DICKSON,
Notary Public.

[Seal of William J. Dickson, notary public.]
Commission expires May 12, 1905.

137 EXHIBIT B.

Collateral trust agreement.

This agreement, made this first day of November, one thousand nine hundred and five (1905) between the Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania (hereinafter called the railroad company), of the first part, and the Girard Trust Company, also a corporation of the State of Pennsylvania (hereinafter called the trustee), of the second part:

Whereas the railroad company has purchased all the capital stock of Coxe Brothers and Company, Incorporated, amounting to fifty-eight thousand two hundred and three (58,203) shares, at the par value of two million nine hundred and ten thousand one hundred and fifty dollars ($2,910,150), and all of the capital stock of the Delaware, Susquehanna and Schuylkill Railroad Company, amounting to thirty thousand (30,000) shares, at the par value of one million five hundred thousand dollars ($1,500,000);

And whereas at a meeting of the board of directors of the railroad company, duly called and held in its office at the city of Philadelphia, on the thirteenth day of October, in the year one thousand nine hundred and five, a draft of an agreement, in the form of this agreement, was submitted and read, and a resolution in the following words was duly and unanimously adopted, viz:

"*Resolved*, That the proper officers of this company be and they are hereby authorized and directed in its behalf and under its corporate seal and in form substantially that now submitted to this board, to execute an agreement with the Girard Trust Company to secure an issue of bonds for an aggregate principal sum of nineteen million dollars ($19,000,000) each bond of the denomination of one thousand dollars ($1,000), payable in gold coin of the United States of America of the present standard of weight and fineness, as in
138 said agreement to be provided, at the office of the Lehigh Valley Railroad Company in the city of Philadelphia, Pennsylvania, on the first days of August and February, from August 1st, A. D. 1907, with interest thereon from the first day of August, A. D. 1905, at the rate of four per cent per annum, payable semi-annually on the first days of the months of February and August in each year thereafter at the said office until the respective series of bonds shall become due and payable as in said agreement provided; principal and interest of said bonds payable without deduction from either principal or interest of any tax or taxes of the United States or of any State or municipality thereof which the Lehigh Valley Railroad Company may be required to pay or retain therefrom under any present or future law."

And whereas the bonds to be secured by this agreement are to be coupon bonds of the denomination of one thousand dollars ($1,000.00), to be issued in series of five hundred thousand dollars ($500,000.00), the series to be numbered one (1) to thirty-eight (38) both inclusive, said bonds to be retired in the order of their serial number on the dates hereinafter mentioned, or after July 31st, 1912, at the option of the railroad company, as hereinafter provided, viz:

Series 1, payable August first, nineteen hundred and seven (1907).
Series 2, payable February first, nineteen hundred and eight (1908).
Series 3, payable August first, nineteen hundred and eight (1908).
Series 4, payable February first, nineteen hundred and nine (1909).
Series 5, payable August first, nineteen hundred and nine (1909).
Series 6, payable February first, nineteen hundred and ten (1910).
Series 7, payable August first, nineteeen hundred and ten (1910).
139 Series 8, payable February first, nineteen hundred and eleven (1911).
Series 9, payable August first, nineteen hundred and eleven (1911).
Series 10, payable February first, nineteen hundred and twelve (1912).

Series 11, payable August first, nineteen hundred and twelve (1912).
Series 12, payable February first, nineteen hundred and thirteen (1913).
Series 13, payable August first, nineteen hundred and thirteen (1913).
Series 14, payable February first, nineteen hundred and fourteen (1914).
Series 15, payable August first, nineteen hundred and fourteen (1914).
Series 16, payable February first, nineteen hundred and fifteen (1915).
Series 17, payable August first, nineteen hundred and fifteen (1915).
Series 18, payable February first, nineteen hundred and sixteen (1916).
Series 19, payable August first, nineteen hundred and sixteen (1916).
Series 20, payable February first, nineteen hundred and seventeen (1917).
Series 21, payable August first, nineteen hundred and seventeen (1917).
Series 22, payable February first, nineteen hundred and eighteen (1918).
Series 23, payable August first, nineteen hundred and eighteen (1918).
Series 24, payable February first, nineteen hundred and nineteen (1919).
Series 25, payable August first, nineteen hundred and nineteen (1919).
Series 26, payable February first, nineteen hundred and twenty (1920).
140 Series 27, payable August first, nineteen hundred and twenty (1920).
Series 28, payable February first, nineteen hundred and twenty-one (1921).
Series 29, payable August first, nineteen hundred and twenty-one (1921).
Series 30, payable February first, nineteen hundred and twenty-two (1922).
Series 31, payable August first, nineteen hundred and twenty-two (1922).
Series 32, payable February first, nineteen hundred and twenty-three (1923).
Series 33, payable August first, nineteen hundred and twenty-three (1923).
Series 34, payable February first, nineteen hundred and twenty-four (1924).
Series 35, payable August first, nineteen hundred and twenty-four (1924).

Series 36, payable February first, nineteen hundred and twenty-five (1925).

Series 37, payable August first, nineteen hundred and twenty-five (1925).

Series 38, payable February first, nineteen hundred and twenty-six (1926).

Now, this agreement witnesseth:

First. It is agreed that fifty-eight thousand one hundred and seventy-eight (58,178) shares of the capital stock of Coxe Brothers and Company, Incorporated, at the par value of two million nine hundred and eight thousand nine hundred dollars ($2,908,900) and twenty-nine thousand nine hundred and sixty-five (29,965) shares of the capital stock of the Delaware, Susquehanna & Schuylkill Railroad Company of the par value of one million four hundred and ninety-eight thousand two hundred and fifty dollars ($1,498,250),
141 being the entire capital stocks of the said companies respectively, with the exception of twenty-five shares (25) of the par value of twelve hundred and fifty dollars ($1,250) of the capital stock of Coxe Brothers and Company, Incorporated, and thirty-five (35) shares of the par value of seventeen hundred and fifty dollars ($1,750) of the capital stock of the Delaware, Susquehanna & Schuylkill Railroad Company, held by the directors thereof (the certificates thereof to be held by the trustee subject to the terms of this agreement) shall be this day transferred to and deposited with the trustee, for the purpose of securing an issue of bonds in the following form:

(Form of coupon bonds.)

Series .

United States of America, State of Pennsylvania.

No. .

Lehigh Valley Railroad Company. Collateral trust four per cent gold bond. Total issue, $19,000,000.

Know all men by these presents, that the Lehigh Valley Railroad Company, for value received, acknowledges itself indebted to the bearer hereof in the sum of one thousand dollars in gold coin of the United States of America, of the present standard of weight and fineness, which sum the said railroad company promises to pay in like gold coin to the bearer, or if registered, as hereinafter provided, to the registered owner of this bond, at the office or agency of the said railroad company in the city of Philadelphia, Pennsylvania, on the first day of A. D. 19 , with interest thereon from the
142 first day of August, A. D. 1905, at the rate of four per centum per annum, payable semiannually, in like gold coin, on the first days of the months of February and August in each year, on delivery of the annexed coupons therefor. The principal and interest of this bond are payable without deduction from either principal or interest for any tax or taxes which may be payable under any present

or future laws of the United States of America, or of any State or municipality thereof for national, state, or municipal purposes, the said railroad company hereby agreeing to pay any such tax, or taxes, which it may now, or hereafter be required by any such law to retain therefrom.

This bond is one of an issue of bonds of like tenor and date, but maturing at various times, amounting in the aggregate to nineteen million dollars ($19,000,000), secured by, and subject to, the provisions of an agreement duly executed and delivered by the Lehigh Valley Railroad Company to the Girard Trust Company, bearing even date herewith, assigning and transferring to the said Girard Trust Company, in trust, fifty-eight thousand one hundred and seventy-eight (58,178) shares of the capital stock of Coxe Brothers and Company, Incorporated, and twenty-nine thousand nine hundred and sixty-five (29,965) shares of the capital stock of the Delaware, Susquehanna and Schuylkill Railroad Company, upon the terms and conditions which by said agreement will appear, to all the terms of which reference is had and of which the holder hereof is required to take notice. The modes prescribed in said agreement for the recovery of the principal and interest of the said bonds are exclusive of all others. This bond shall pass by delivery unless registered. The holder hereof may have the ownership of this bond registered on the books of said railroad company, in the city of Philadelphia, Pennsylvania, such registry being noted on the bond, after which no transfer shall be valid unless made on the said books by the registered holder in person or by attorney duly authorized, and noted on the bond; but the same may be discharged from registry by being in like manner transferred to bearer, after which it shall be transfer-
143 able by delivery, such registration, however, shall not affect the negotiability of the coupons by delivery merely. Or the holder hereof may at any time surrender to the said railroad company all the coupons hereto annexed, not then due, for cancellation, and have this bond entered on the company's books as a registered bond, transferable only on the books of the company, and the interest thereon semiannually at the rate of four per centum per annum, and the principal thereof, when due, shall be payable only to the registered holder hereof or his legal representatives or assigns.

The railroad company may redeem any of the bonds due and payable after July thirty-first, 1912, on the first day of August and February in any year, after said thirty-first day of July, 1912, at two and a half per cent premium upon sixty days' notice thereof, advertised not less than once a week in a newspaper published in the city of Philadelphia, Pa., and in one published in the city of New York, N. Y., under and in pursuance of the terms and provisions in said agreement contained. Upon the dates so fixed for redemption, interest hereon shall cease.

This bond is not to become obligatory upon the railroad company until the certificate indorsed hereon shall have been signed by the trustee under said agreement.

In witness whereof, the said Lehigh Valley Railroad Company has caused these presents to be signed by its president or by its vice-president, and its corporate seal to be hereunto affixed and attested by its secretary, and coupons for said interest with the engraved signature of its treasurer to be attached hereunto, this first day of November, 1905.

LEHIGH VALLEY RAILROAD COMPANY,

[L. S.] By , *Vice-President.*

Attest:

, *Secretary.*

(Coupon.)

144 On the first day of the Lehigh Valley Railroad Company will pay to bearer twenty dollars in gold coin at the office or agency of the said Lehigh Valley Railroad Company, in Philadelphia, Pennsylvania, being six months' interest then due on its collateral trust gold bond No. .

$20.

Treasurer.

(Trustee's certificate.)

This bond is one of a series of nineteen thousand bonds of one thousand dollars each, referred to in the within-mentioned trust agreement executed by Lehigh Valley Railroad Company, and delivered to the undersigned.

GIRARD TRUST COMPANY, *Trustee.*

By , *Vice-President.*

145 Second. The said bonds shall be issued in series and amounts as above stated. The railroad company shall execute said bonds, and upon receipt of the collateral hereinbefore mentioned the trustee shall certify and deliver said bonds to the railroad company upon the written order of the president of the railroad company. The railroad company hereby expressly reserves the right to be exercised by itself or the trustee by the use of any funds under the control of the railroad company to redeem any bond or bonds hereby secured, the principal whereof is payable after July 31, 1912, on the first day of August and February in any year after said 31st day of July, 1912, at par with two and a half per cent premium added thereto (in addition to all interest accrued on such bond to such date of redemption) after sixty days' notice published not less than once a week in one newspaper published in the city of Philadelphia, Pa., and in one published in the city of New York, N. Y. Such notice shall designate by serial number the bonds so to be redeemed, unless all the outstanding and theretofore uncalled bonds be called in, in which case a statement to that effect will be sufficient. All bonds hereby secured when and as redeemed shall be cancelled by the trustee and surrendered to the railroad company.

In making any redemption of less than all the bonds hereby secured at such time outstanding and uncalled, the bonds so to be redeemed

shall be in the order of their serial number, but not less than all of any one series, and the bonds so redeemed shall be redeemed on the first day of August or the first day of February next thereafter ensuing after advertisement as aforesaid.

Third. If at any time the railroad company shall make
146 default in the payment of interest or principal of said bonds when and as the same shall severally be due and payable, and such default shall continue for sixty (60) days after such interest and principal or either of them shall become due and payable, or if the said railroad company shall at any time fail to pay the rents or royalties reserved in the several coal leases to said Coxe Brothers and Company, Incorporated, for a period of sixty days from the times fixed in said several leases for the payment of said rents or royalties, or shall fail in the performance of any of the covenants and conditions herein provided, then and in such case, the trustee may and upon the written request of the holders of a majority in amount of the said bonds outstanding and unpaid, shall sell at public sale at the best price that can be obtained therefor, the whole of the said stocks then in possession of the trustee, or so much thereof as may be necessary to pay the said bonds and all arrears of interest thereon, and any surplus remaining after the application of the net proceeds of such sale of stocks by the trustee shall be paid over to the railroad company; if after the sale of the said stocks any balance shall still remain unpaid of the amount due upon said bonds the holders thereof may proceed to collect the same directly from the obligor; it being expressly understood by and between the parties hereto that in case default in payment of principal or interest, or of the rents or royalties or in the performance of any of the covenants and conditions herein provided, shall be made as aforesaid, then the whole of the said bonds outstanding and unpaid shall, upon the demand of the holders of a majority thereof being made as aforesaid, become due and payable forthwith; and except as herein otherwise provided any
147 proceeding at law or in equity to enforce any covenant of the railroad company contained herein or in the said bonds shall be only in the name of the trustee for the benefit of the holders of all the bonds then outstanding.

Fourth. Until default shall be made in the payment of interest or principal as herein provided, or of the rents or royalties as aforesaid, the said trustee shall permit and suffer the railroad company to retain and exercise all the rights, powers, and privileges belonging to or incident to the ownership of the stocks hereby deposited with the trustee, and to receive the dividends thereon, and the said trustee shall and will from time to time execute and deliver to the railroad company powers of attorney or orders for the collection of such dividends, and proxies to be used at annual or special meetings of stockholders for the election of directors, or for any purpose incident to the ordinary and usual business of the company, except, however, and provided always, that such proxies shall in no case be used for the creation of any mortgage indebtedness of Coxe Brothers and Com-

pany, Incorporated, or of the Delaware, Susquehanna and Schuylkill Railroad Company; it being understood and agreed, that until the payment of the last instalment of principal as hereinbefore provided and the termination of this agreement, the railroad company will not, as the owner of the capital stock of Coxe Brothers and Company, Incorporated, or of the Delaware, Susquehanna and Schuylkill Railroad Company, consent to the sale or encumbering of the property of the said companies or either of them or cause or consent to the increase of the capital stock of either of said companies, or to the increase of the indebtedness to any extent that will diminish the value of the capital stock, and that no indebtedness beyond that arising in the ordinary and usual conduct of the business of either of said companies shall be created.

148 And the railroad company also agrees that it shall not suffer or allow any leases now held by Coxe Brothers and Company, Incorporated, to be forfeited, nor cause or permit any breach of the lessee's covenants in any of the said leases.

Fifth. It is hereby further covenanted and agreed and this trust is accepted upon the express condition that neither the said trustee nor any successors in the trust shall incur any responsibility or liability by reason of permitting and allowing the railroad company to retain and preserve the powers and authority hereinbefore provided for in regard to the stock of Coxe Brothers and Company, Incorporated, and the Delaware, Susquehanna and Schuylkill Railroad Company, nor shall the said trustee or any successors in the trust be in any way responsible for any other matter or thing whatever except its negligent, wilful, or intentional breaches of the trust herein expressed and contained; and the said trustee or any successors in the trust shall not at any time be bound or required to undertake any proceeding at law or in equity or otherwise for the protection of the bondholders, involving expenditures of or liability for the payment of money; unless (if the trustee shall see fit to require it) adequate indemnity against such liability or outlay be furnished it by the bondholders asking of it such action or proceeding.

Sixth. The railroad company agrees to pay the charges of the trustee and the expenses attending the execution of this trust, and of any sale or sales thereunder.

Seventh. The railroad company shall from time to time execute any other and further instruments or assurances necessary or requisite to carry out the purposes hereof.

149 Eighth. If the interest and principal of the said bonds shall be paid when and as the same shall become payable according to the tenor and effect of the said bonds, and according to the provisions of this agreement, then the said trustee, at the request of the railroad company, shall retransfer and deliver to the railroad company the said stocks, and upon such transfer and delivery and full settlement of the trust account with the railroad company,

the said trustee shall be thenceforth discharged from further duties under this trust, and this agreement shall thereupon be terminated.

In witness whereof, the Lehigh Valley Railroad Company, the party hereto of the first part, has caused this agreement (executed in duplicate), to be signed by its president, and its corporate seal to be hereunto affixed, and the same to be attested by the signature of its secretary; and the Girard Trust Company, the party hereto of the second part, has caused this agreement to be signed by its vice-president, and its corporate seal to be hereunto affixed and the same to be attested by its secretary, the day and year first above written.

LEHIGH VALLEY RAILROAD COMPANY,
By E. B. THOMAS, *President.*

[Seal Lehigh Valley R. R. Co.]
Attest:
D. G. BAIRD, *Secretary.*

GIRARD TRUST COMPANY,
By W. N. ELY, *Vice-President.*

[Seal Girard Trust Co.]
Attest:
E. S. PAGE, *Secretary.*

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, complainant, *vs.* LEHIGH VALLEY RAILROAD COMPANY, defendant.	April session, 1908. No. 97. In Equity.

It is stipulated and agreed between counsel in the above cause that its submission on bill and answer and any averment or admission in the pleading of either party contained shall in nowise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted, and shall be operative and take effect only with respect to the present suit and for the purposes thereof.

CHARLES J. BONAPARTE,
Attorney-General.

JOHN G. JOHNSON,
Atty. for Deft.

ROBERT W. DE FORREST,
Atty. for Deft.

(Endosed:) U. S. C. C., E. D. of Penna. No. 97. April session 1908. Equity. U. S. v. Lehigh Valley Railroad Company. Stipulation of counsel. Filed June 16, 1908. Henry B. Robb, Clerk. L

156 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, complainant, *vs.* LEHIGH VALLEY RAILROAD COMPANY, defendant.	April session, 1908. No. 97. In Equity.

The complainant in this cause hereby joins issue with the defendant, Lehigh Valley Railroad Company, and will submit the cause, by permission of the court, on bill, answer, and the stipulation and agreement between counsel in said cause filed.

CHARLES J. BONAPARTE,
Attorney-General.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 97. April session, 1908. Equity. U. S v. Lehigh Valley Railroad Company. Replication. Filed June 16, 1908. Henry B. Robb, clerk. L.

In the Circuit Court of the United States, for the Eastern District of Pennsylvania.

April sessions, 1908.

UNITED STATES OF AMERICA *v.* THE DELAWARE & HUDSON Company.	In Equity, No. 85. At Law, No. 202.
UNITED STATES OF AMERICA *v.* ERIE RAILROAD COMPANY.	In Equity, No. 87. At Law, No. 204.
UNITED STATES OF AMERICA *v.* THE CENTRAL RAILROAD OF New Jersey.	In Equity, No. 89. At Law, No. 206.
UNITED STATES OF AMERICA *v.* DELAWARE, LACKAWANNA and Western Railroad Company.	In Equity, No. 91. At Law, No. 208.

Filed Sept. 10, 1908. Henry B. Robb, clerk, per L., deputy clerk.

UNITED STATES OF AMERICA *v.* THE PENNSYLVANIA RAILROAD Company.	In Equity, No. 95. At Law, No. 212.

UNITED STATES OF AMERICA *v.* LEHIGH VALLEY RAILROAD Company.	In Equity, No. 97. At Law, No. 214.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge:

There have been filed in this court on behalf of the United States, by the Attorney-General thereof, six bills in equity against the railroad corporations, defendants respectively, as named in the cases set forth in the caption; the Delaware and Hudson Railroad Company and the Erie Railroad Company being corporations by and under the laws of the State of New York; the Central Railroad Company, a corporation by and under the laws of the State of New Jersey, and the Delaware, Lackawanna & Western Railroad Company, the Pennsylvania Railroad Company, and the Lehigh Valley Railroad Company, corporations by and under the laws of the State of Pennsylvania. There were also filed at the same time on behalf of the United States, at the relation of the said Attorney-General, under the authority of the act of Congress entitled "An act to regulate commerce," approved February 4, 1887, and of acts amendatory thereof, petitions for mandamus against the said defendants, respectively. Both the bills in equity and the petitions for mandamus are founded upon the same acts in alleged violation, or threatened violation, by the defendants, respectively, of one of the provisions of section one of the said act to regulate commerce, approved February 4, 1887, as amended June 29, 1906, the said provision being as follows:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

These charges of violations of this so-called "commodities clause" are, as we have said, the same in the bill in equity as in the petition for mandamus against each defendant. It is, in substance, charged in the bill and petition against each defendant that it operates, and has been operating, long prior to the said 8th day of May, 1906, a railroad or railroads in and through the anthracite coal fields of the State of Pennsylvania, and into New Jersey, New York, and other States, and, as a common carrier through all said period, has been engaged in interstate transportation of the article or commodity known as anthracite coal, from the mines and mining lands in the State of Pennsylvania to the said other States; that as to some of

said defendants, the coal so transported has been in large measure owned, in whole or in part, by them, either through purchase, or as being the product of their own mines and coal lands. It is also charged in each of said bills and petitions that the defendant has been engaged during the period aforesaid in the interstate transportation of coal, in which it had an interest, direct or indirect, by reason of its ownership of the stock of other companies owning or mining and producing the coal; and generally, that by continuing such interstate transportation of said coal, as aforesaid, each defendant has acted in violation of the said "commodities clause," by so transporting an article or commodity, other than timber and the manufactured products thereof, owned by said defendant in whole or in part, or in which it has or will have an interest, direct or indirect, or which has been mined or produced by it or under its authority, and which article or commodity is not necessary or intended, and will not be necessary and intended "for its use in the conduct of its business as a common carrier."

Each bill seeks to enjoin the defendant therein from further transporting in interstate commerce the anthracite coal, which it alleges it is the purpose of said defendant to transport, as thereinbefore stated, and each petition for mandamus prays for the issuance of an alternative writ, commanding and directing the defendant therein to forthwith and hereafter comply with the provisions of the law hereinbefore quoted, by forthwith and thereafter ceasing and refraining from transporting in interstate commerce, as therein alleged, the anthracite coal which, as is alleged, it is the purpose of the defendant to transport, or to appear and show cause, etc.

To these several bills and petitions, answers have been filed by the defendants therein, respectively. In these answers, it is admitted, generally, by the defendants, that the allegations in the bills and petitions, as to their corporate existence, are true, and that they own or operate railroads engaged in the interstate transportation of coal from the anthracite region of Pennsylvania. They also admit that this transportation has been carried on by the several defendants long prior to the 8th day of May, 1906, and in the case of some of them, for a period varying from a quarter to more than half a century prior thereto. In addition to these general admissions, detailed statements are made by the defendants, respectively, of the character and extent of the ownership or other interest possessed by them in the coal so transported, or in the lands or mines from which it is produced. It is only necessary to briefly summarize these statements:

(1) The Delaware and Hudson Company alleges that it directly owns its coal lands as it does its railroad; that it was incorporated
by an act of the legislature of the State of New York, April
91 23, 1823, and was "authorized to construct a canal or water navigation from the anthracite coal district in Pennsylvania to the Hudson River in New York; to purchase lands in Pennsylvania containing stone or anthracite coal; and to employ its capital in the business of transporting to market coal mined from such lands."

That this authority was also expressly conferred by acts of the legislature of the State of Pennsylvania, between the years 1823 and 1871, and that these acts of the State of Pennsylvania resulted from the desire and policy of said State to create and foster the industry of mining such coal and developing the transportation thereof; that under the authority of these statutes of Pennsylvania and of New York, the said defendant, beginning as early as the year 1825, invested its capital in the purchase of a large quantity of coal lands in the State of Pennsylvania and in the construction of canal navigation in Pennsylvania from the Delaware River to the Hudson River; that later, under statutes of both States, it invested additional capital in the construction of railroads in the State of Pennsylvania, and in the construction and acquisition of railroads and leasehold estates in the State of New York, for the same general purpose of transporting coal from the coal lands owned by it; that it has invested large sums of money, not only in the acquisition of coal property, but in the erection of structures for mining and terminal facilities; that some of its coal properties were acquired under leases upon royalties payable to the lessors for each ton of coal mined, the leases fixing large minimum amounts by way of rent; that large fixed rentals are required to be paid, not only for those mining lands but for railroads acquired for the purpose of transporting coal; that there are three coal companies whose shares are practically all owned by it, viz, The Northern Coal & Iron Co., The Jackson Coal Co., and The Hudson Coal Co.; that its mining lands thus owned and acquired are located upon or contiguous to the railroads of defendant; that said railroads are the only reasonable, practical, and conveniently available avenues of transportation whereby the coal by it produced can be transported in interstate commerce, and the coal mined by the defendant and by said coal companies upon its lines of railroad amounts approximately to 70 per cent of the entire transportation by it, or to about 4,300,000 gross tons, its daily shipments averaging about 12 trains of 37 coal cars each; that the coal lands so acquired by the defendant and by said three coal companies would have little, if any, value, except for the mining of coal therefrom and its sale as a commercial commodity, and that if it is deprived, by virtue of the said act of Congress, of the right to transport said coal, it will be deprived of the only possible enjoyment of its property. It further avers that it is not a "railroad company" within the meaning of the act of Congress, but that it is a coal company, and that since the year 1870 it has become, incidentally to its business as a coal mining company, a common carrier by railroad of passengers and property.

It is further averred, as a special ground of defense by the said Delaware and Hudson Company, that this said "commodities
92 clause" does not apply to it, because all the coal mined by it upon its own lands, and upon the lands of the said three coal companies (except as to steam sizes, as thereafter stated) "is sold, before transportation thereof begins, by said company to third persons at the mines in Pennsylvania from which such coal has been

produced, and that said company does not, at the time when the same is so transported by it in interstate commerce, own the same nor any interest therein, direct or indirect, apart from its obligation and rights as a common carrier in the transportation thereof, and that it carries said coal for the account of the purchaser thereof, who is the consignor and owner of said coal.

(2) The answer of the Erie Railroad Company states that it was originally organized under the laws of the State of New York in 1832; that it has been reorganized from time to time under mortgage foreclosure; and finally, in November, 1895, under a foreclosure sale, it was reorganized under the statutes of New York, whereby it "became the the lawful owner of the property, rights, privileges, immunities, and franchises of all its predecessors aforesaid, including the shares of capital stock of coal companies and of railroad companies, as well as the railroads theretofore held and possessed by said predecessor companies, the railroads so owned by it and its said subsidiary companies having an aggregate mileage of over 2,100 miles in the States of New York, Pennsylvania, New Jersey, Ohio, Indiana, and Illinois;" that the Pennsylvania Coal Company was created a corporation by the laws of Pennsylvania in 1838, its charter giving it the right of "transacting the usual business of companies engaged in mining, transporting to market, and selling coal and the other products of coal mined;" and for that purpose it was given the power to purchase or lease coal lands in Pennsylvania; also the power to construct railroads with one or more tracks. In 1853 the said Pennsylvania Coal Company was authorized to extend its railroad to connect with the New York & Erie Railroad. The right of said Pennsylvania Coal Company to buy coal lands and build railroad connections was continued by acts of the legislature of Pennsylvania in 1857, 1864, 1867, and 1868; that in pursuance of these various acts of the legislature, the Pennsylvania Coal Company obtained capital, issued stock therefor, acquired coal lands, developed coal mines, produced, transported to markets, and sold coal; built and operated railroads, made railway connections as authorized, and did other like acts to promote the business of supplying all persons needing the same with anthracite coal. The Hillside Coal & Iron Company was organized by an act of the legislature of the State of Pennsylvania in 1869 for the purposes and with powers similar to those of the Pennsylvania Coal Company. Under authority of acts of the legislature of Pennsylvania, the said Erie Railroad Company, long prior to the passage of the said amendment to the interstate-commerce act, acquired substantially all the capital stock of said Pennsylvania Coal Company, the Hillside Coal & Iron Company, the Jefferson Railroad Company, and Erie & Wyoming Railroad Company, and a small minority of the stock of the Temple Iron Company; and has pledged the same under various mortgages, pursuant to which have been issued and are now outstanding bonds for large sums, aggregating many millions of dollars, which bonds are held by purchasers in good faith and for value throughout the world; that for many years prior to

May 1, 1908, it has been engaged in transporting the coal of said corporations to markets outside the State of Pennsylvania, many of which can only be reached from the railroad lines of this defendant; that the coal so transported amounts annually to several millions of tons and constitutes 22 per cent of the entire freight tonnage of this defendant, the Erie Company. It also denies that it is, by reason of the ownership of said stock in said companies, the owner in whole or in part of the coal transported by it in interstate commerce, or that it has or had any interest, direct or indirect, therein, and therefore has not violated or failed to comply with the so-called "commodities clause" of the interstate-commerce act.

(3) The Central Railroad Company of New Jersey avers that it was organized under the laws of the State of New Jersey, and by these laws was authorized to purchase and hold the stock or securities of any other corporation, of New Jersey or elsewhere, and that it was also so authorized by two acts of assembly of the State of Pennsylvania, one of which, approved April 15th, 1869, was entitled "An act to authorize railroad and canal companies to aid in the development of coal, iron, lumber, and other material interests of this Commonwealth;" that pursuant to the authority of these several acts, it had long prior to the said act of Congress, become the owner of a majority of the shares of the capital stock of the Honeybrook Coal Company and of the Wilkes-Barre Coal & Iron Company, both companies now being merged into the Lehigh & Wilkes-Barre Coal Company, a large majority of whose shares are owned by it; that it also owns a minority of the shares of the Temple Iron Company; that in 1871 it became the lessee of the Lehigh & Susquehanna Railroad, a Pennsylvania corporation, which it has ever since operated under an obligation to pay a yearly rental of not less than $1,414,400, and not to exceed $2,043,300 per annum; that its gross earnings from the transportation of coal amounted, for the year ending June 7th, 1907, to $9,312,268.04, being 48 per cent of its entire freight receipts; and that a large part of its earnings from freight and miscellaneous passenger traffic is incident to and dependent upon the operation of the mines and colleries of said coal companies; and that the greater part of its earnings from transportation of coal comes from its carriage of the coal mined by the Lehigh & Wilkesbarre Coal Company; and that large sums of money have been expended by it in extending its lines and in constructions to enable it to transport said coal in interstate commerce.

(4) The Delaware, Lackawana & Western Railroad Company, like the Delaware & Hudson Company, admits that it is the owner of coal lands, and mines coal which it sells; that it was organized under an act of the legislature of Pennsylvania in 1849; that all the lines of railroad owned by it are wholly within the State of Pennsylvania, extending from the Delaware River, at the boundary line of the State of New Jersey, in a northwesterly direction across the State of Pennsylvania to the boundary line between the State of Pennsylvania and the State of New York, with a branch line extending

from Scranton, in the State of Pennsylvania, to Northumberland, in said State. Said defendant also admits and alleges that, under express authority of acts of the legislature of the States of Pennsylvania, New Jersey, and New York, it, as lessee, now operates, and long prior to May 1st, 1908, has operated, various lines of railroad in the two last-mentioned States, by which it has direct traffic connection with the city of Buffalo and other cities in the said States. Defendant also admits that for many years it has owned, in fee, extensive tracts of coal land in the State of Pennsylvania; that it has also leased large tracts of coal land in the said State, and is now engaged, and for many years last past has been engaged, in mining coal from the lands so owned and leased by it; that the holding of said lands, whether in fee or by lease, and the mining, manufacture, and interstate transportation of the coal therefrom has been and continues to be under and by virtue of the authority of the laws of the State of Pennsylvania.

That in addition to the foregoing, certain coal companies, organized from time to time under acts of assembly of the said State of Pennsylvania, have been merged into said defendant corporation; that by an act of the general assembly of the State of Pennsylvania, approved April 15th, 1869, entitled "An act to authorize railroad and canal companies to aid in the development of the coal, iron, lumber, and other material interests of this Commonwealth," the defendant was authorized to aid corporations authorized by law to develop coal, iron, lumber, and other material interests of Pennsylvania, by the purchase of their capital stock or bonds, or either of them. The answer of said defendant also alleges that, by reason of its ownership of said coal lands and coal, and the revenues derived from the transportation of the same to market, it has been enabled to expend millions in the betterment of its general transportation facilities for both goods and passengers, and give to the public the benefits of a well constructed and equipped modern railroad.

That by virtue of leases of railroads, to enable it to transport coal in interstate commerce, it has become bound to pay yearly, in interest charges, the sum of $5,155,697, and for taxes $1,163,916. That out of a total of about 8,700,000 tons of coal produced by it in the year 1907 from its land owned in fee and leased, upwards of 6,700,000 tons were transported over its lines of railroad in interstate commerce; that from 40 per cent to 60 per cent of its annual transportation earnings, from the operation of leased lines, has been derived from the carriage of its own coal thereover.

That it uses, in the conduct of its business as a common carrier, approximately 1,700,000 tons of anthracite coal, of pea size or smaller, annually, and will require more for such use in the future; that to obtain this coal in these economic sizes it is necessary to break up coal, leaving the larger sizes which must be disposed of otherwise; that great waste would result if it were forbidden to transport to market in interstate commerce these larger sizes thus resulting.

That defendant's rights to acquire its holding of coal land, its rights to own and mine coal and to transport the same to market in other States as well as in Pennsylvania, and its leases of other railroads, were acquired many years prior to the enactment of the so-called "interstate commerce act," and of the said amendment thereto known as the "commodities clause."

(5) The answer of the Pennsylvania Railroad Company avers that it was incorporated under the laws of the State of Pennsylvania April 13th, 1846; that as early as 1871, under authority of two general statutes of the State of Pennsylvania, it became the owner of all the shares of the Susquehanna Coal Company, of all the shares of the Summit Branch Mining Company, and of one-third of the shares of the Mineral Railroad Mining Company, corporations of the State of Pennsylvania; that since the last-mentioned year, and up to the present time, it has carried the coal produced from the mines of the said coal companies, at lawfully established schedule rates, over its lines of railroad; that approximately 65 per cent of the coal so mined has been carried to destinations outside the State of Pennsylvania; that it mines no coal, but that the coal it carries is mined by the said coal companies, and that it has no interest therein within the meaning of the said act of Congress, either direct or indirect; that the most largely producing of the properties belonging to these coal companies are located either directly upon, or so contiguous to the system of railroads operated by said defendant, as to render transportation by any other railroads not reasonably practicable.

(6) The answer of the Lehigh Valley Railroad Company states that it was originally incorporated September 20th, 1847, under the laws of the State of Pennsylvania. Under the authority of various acts of assembly of the said State, other railroad and coal companies, prior to the year 1874, have been merged into it, some of which railroads were expressly authorized to construct railroads and to carry on the business of mining, transporting, and vending coal. It is also the lessee of railroads in Pennsylvania; that by means of its own and of said leased lines of railroad it conducts, and for many years has conducted, an interstate transportation of coal; that since 1872, pursuant to authority conferred by the laws of Pennsylvania, it has also owned the majority of the capital stock of the New York and Middle Coal Field Railroad and Coal Company, a corporation of the State of Pennsylvania; also the entire capital stock of Coxe Bros. & Company, a corporation of said State; a minority interest in the capital stock of the Highland Coal Company; a majority of the stock of the Locust Mountain Coal & Iron Company; a minority interest in the capital stock of the Packer Coal Company and of the Temple Iron Company, all corporations of the State of Pennsylvania, organized for the purpose of mining coal, some of them more than half a century ago; that it has constructed lines of railroad and branch railroads and terminal facilities for the purpose of transporting to market, in interstate commerce, the coal of the companies whose shares it owns, and this business has been conducted by it for

many years; that practically said coal can be transported to market only by its railroads; that the capital stock of two of the coal companies owned by said defendant has been transferred to a trustee, to hold under a general mortgage executed by defendant, under which mortgage bonds to the amount of $23,539,000 have been issued by said defendant and are now outstanding in the hands of the public; that the capital stock of Coxe Bros. & Company, Inc., owned by this defendant as aforesaid, has been transferred and assigned to, and is now held by, a trustee under a collateral trust agreement executed by said defendant, dated November 1st, 1905, for the purpose and upon the terms expressed in said agreement, a copy of which is annexed to said answer, and that bonds to the amount of $18,000,000 have been issued under said agreement and are now outstanding in the hands of the public; that said defendant transports annually, in interstate commerce, upwards of 7,600,000 tons of anthracite coal, shipped by the said coal companies whose stock is owned by said defendant, in whole or in part as aforesaid, and transports annually for said coal companies, wholly within the State of Pennsylvania, upwards of 1,500,000 tons; that nearly 42 per cent of its gross annual earnings of $36,068,431 for the last fiscal year, or $15,110,899, were derived from coal freights, which represented over 51 per cent of its entire freight tonnage; that the greater part of its gross earnings from coal transportation was received from the coal companies whose shares are by it owned; that the mines and collieries of said coal companies are all so located in the portions of the coal fields tributary to its lines of railroad that no means of transporting their product can be made available, except by defendant's railroads; that the railroad lines of this defendant have been from time to time extended, the control of other railroads acquired, and its facilities and equipment increased at enormous expense, in reliance upon the rights and franchises conferred by the statutes of Pennsylvania aforesaid; that a very large part of defendant's earnings is derived from the freight and passenger traffic incidental to and dependent upon the operation of the mines and collieries of said coal companies, and that if said defendant were deprived of the earnings derived from the transportation of the coal of said coal companies its business could not be continued, except at a net loss of many millions of dollars per annum.

These cases have all been submitted to the court upon the bills and answers in the cases in equity and the petitions and answers in the mandamus proceedings; the statements of fact, therefore, contained in these answers must be taken to be true. There is no disagreement, however, as to any of the material facts, whether stated in the bills and petitions or in the answers, or as to those general facts of economic and industrial history of which judicial notice can be taken. The questions of law arising out of these facts in each of the cases are of such a character that they were heard and will now be considered together.

Some of the questions raised and stated in the answers are in a measure special and peculiar to individual cases, and arise out of the

extent and character of the ownership, or of the interest, direct or indirect, existing as to the coal, which of course is the commodity here in question transported in interstate commerce.

The fundamental and underlying question, however, which presents itself at the threshold of all the cases for our consideration is whether the so-called "commodities clause," amendatory of the act to regulate commerce, passed January 29th, 1906, so far as its scope applies by the universality of its language to the cases here presented, is in excess of the legislative authority granted to Congress by the Constitution. This question must be considered with reference to the Constitution as a whole and in relation to the concrete facts of the several cases. It is therefore necessary to keep in mind the situation as presented by these defendants, the facts set forth in their individual answers as above briefly summarized, and the relevant industrial conditions, which, being matters of common knowledge, may be judicially noticed.

The general situation is that for half a century or more it has been the policy of the State of Pennsylvania, as evidenced by her legislative acts, to promote the development of her natural resources, especially as regards coal, by encouraging railroad companies and canal companies to invest their funds in coal lands, so that the product of her mines might be conveniently and profitably conveyed to markets in Pennsylvania and in other States. Two of the defendant corporations, as appears from their answers, were created by the legislature of Pennsylvania, one of them three-quarters of a century ago and the other half a century ago, for the expressed purpose that its coal lands might be developed and that coal might be transported to the people of Pennsylvania and of other States. It is not questioned that pursuant to this general policy investments were made by all the defendant companies in coal lands and mines and in the stock of coal-producing companies, and that coal production was enormously increased and its economies promoted by the facilities of transportation thus brought about. As appears from the answers filed, the entire distribution of anthracite coal in and into the different States of the Union and Canada for the year 1905 (the last year for which there is authoritative statistics) was 61,410,201 tons; that approximately four-fifths of this entire production of anthracite coal was transported in interstate commerce over the defendant railroads, from Pennsylvania to markets in other States and Canada, and of this four-fifths, from 70 to 75 per cent, was produced either directly by the defendant companies or through the agency of their subsidiary coal companies.

It also appears from the answers filed that enormous sums of money have been expended by these defendants to enable them to mine and prepare their coal and to transport it to any point where there may be a market for it. It is not denied that the situation thus generally described is not a new one, created since the passage of the act in question, but has existed for a long period of years prior thereto, and that the rights and property interests acquired by the

said defendants in the premises have been acquired in conformity to the constitution and laws of the State of Pennsylvania, and that their right to the enjoyment of the same has never been doubted or questioned by the courts or people of that Commonwealth, but has been fully recognized and protected by both. To this situation the complainant contends the fifth paragraph of the first section of the act to regulate commerce, as amended by the act of June 29, 1906, applies, and strikes with illegality the conduct by the defendants of this enormous business, as above described, a business harmless in itself, and of immense importance to the consumers of coal. We again quote this so-called "commodities clause:"

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct, or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The legislative will could hardly be expressed more unequivocally. There is no room for doubt as to the meaning and practical effect of the clause in question. By it each of the defendants is forbidden to transport in interstate commerce any of the coal

(a) "mined or produced" by it;

(b) "mined or produced under its authority;" or

(c) "which it may own in whole or in part;" or

(d) "in which it may have any interest, direct or indirect; except such as is necessary or intended for its own use in the conduct of its own business."

It results, therefore, that the coal described in the foregoing categories is outlawed in interstate commerce and must remain so unless the defendants can divest themselves of all title or interest in the coal, coal lands, or coal companies, from which the markets in other States have been so largely supplied. The enforcement of the act must, of necessity, result either in the defendants holding their coal properties and refraining from transporting coal to other States and confining themselves to the mining of such coal as may be used in the State of Pennsylvania or in their divesting themselves of all title or interest, direct or indirect, in said properties, by sale or surrender thereof, as they may be able to accomplish the same. The population of the region outside of Pennsylvania absolutely dependent upon the use of anthracite coal for domestic or industrial purposes is very large and has been, no doubt moderately, estimated at from twelve to fifteen millions. The adoption of the former alternative, therefore, would entail, while it continued, an amount of suffering and deprivation that it is hard to forecast or appreciate, while the forced resort to the other would necessarily

inflict upon the defendants and their stockholders a most disastrous sacrifice and pecuniary loss.

That the enforcement of a law should result in loss and inconvenience to individuals, few or many, does not, of course, impugn the legislative authority to enact such law, but it may well serve to challenge the serious consideration not only of the legislative body which enacts it, but of courts who are required to pass upon the question, whether indeed it be a valid law or not.

Congress, of course, is vested only with such legislative powers as are specifically enumerated in the Constitution, together with such as are necessary and proper to carry the same into execution, and it is admitted that, if constitutional sanction exists for the passage of the law in question, it must be found in that clause of the eighth section of article one of the Constitution, declaring that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Upon several grounds, counsel for defendants contend that the said "commodities clause" of the act of June 29, 1906, was not a valid exercise of the power conferred upon Congress by this clause of the Constitution. No other part of the Constitution has been the subject of more judicial consideration and discussion, and no other grant of power has been more frequently invoked to sustain legislation by Congress upon subjects affecting the conduct and business of the citizens of a State, and which theretofore had been left exclusively to state control. Much of this legislation has not only passed the scrutiny of the Supreme Court, but has been admittedly beneficial in its results. The importance and influence of the commerce clause of the Constitution has not only been felt in the direct legislation by Congress which it has authorized, but also in the restraint that it has placed upon state legislation, which has tended to affect or control interstate or foreign commerce.

It is not surprising, therefore, that with the growth of population and the increasing importance of the interstate business of the country there should be an increasing frequency in the exercise by Congress of the power thus conferred, and the legislative records of Congress show a still greater frequency in the proposals for such enactments, which have failed to receive legislative sanction. These considerations serve to emphasize the importance of the duty devolved upon the courts, as well as upon Congress, to carefully compare every such enactment with the scope and intent of the constitutional power invoked therefor.

Fully appreciating the serious responsibility that is imposed upon the court in these cases, and recognizing fully the presumption of validity accorded to legislative acts, we turn to the question raised by defendants, as already stated, viz, whether the so-called "commodities clause," amendatory of the act to regulate commerce, passed January 29, 1906, is, so far as its scope applies by the universality of its language to the cases here presented, a constitutional and valid enact-

ent—one within the legislative authority granted to Congress by the onstitution.

Ample as is the scope of legislative power granted by the lan-uage of the commerce clause, and far as the Supreme Court has ndoubtedly gone in sustaining the validity of legislation under it, we ink it may be safely said that no assertion of this power hitherto by ongress has been so far-reaching or affected in so serious a degree the dividual liberty and property rights enjoyed under the Constitu-on and laws of a State as the enactment we are here considering. is not to be denied that the right to carry in interstate commerce al which they own in whole or in part, or which is mined or pro-uced by them or under their authority, or by coal companies in which ey are stockholders, was, until the passage of the act in question a wful right of these defendants; that it was a common right of prop-ty, neither denied nor disputed by the common or statute law of ennsylvania; that it was a most important property right, the en-yment and exercise of which was neither criminal nor immoral, nd subject only to any restraints imposed upon its possessors by the mmon or statute law of the State, or by the then existing statutes the United States, so far as they were engaged in interstate com-erce. If in any manner and to any extent whatever, they have actu-ly violated the latter, surely they could be restrained, or otherwise ade amenable to the legal penalties in such behalf, without crippling destroying a business in which they are profitably and usefully gaged. We must, however, assume for the purposes of this dis-ssion, in the absence of any assertion to the contrary, that these efendants have regularly complied with and conformed themselves all the legal requirements of the interstate commerce law, touching e business in which they are engaged.

To these defendants, thus innocently and lawfully engaged in trans-rting coal which they own, or are interested in to the extent and nder the circumstances hereinbefore set forth, comes this act of ongress, and declares that this whole business is unlawful, and that e future exercise of a vested right of ownership, which they have retofore and for long periods of years enjoyed, under the be-ef that it was an ordinary right of property enjoyed innocently all citizens of the State alike, and inviolable as such, is a crime, nd punishable as such. That this legislation is drastic and harsh oes not, of course, dispose of the question of power on the part Congress to enact it. Many laws, clearly within the legislative wer to enact, may result incidentally in loss or inconvenience to dividuals and to particular interests. The first inquiry to be made, erefore, is as to whether this legislation is a regulation of commerce, ithin the true meaning of the commerce clause of the Constitution. is contended that the power to regulate commerce assumes the con-nued existence of the thing to be regulated, and does not include the wer to destroy or inhibit it, at least if the commerce inhibited is t criminal, immoral, or injurious to public health, morals, or safety.

If we pass for the present this contention, the question remains, whether this power is an absolute one, and without any limitation upon its exercise, other than the will of the legislative branch of the Government.

It is impossible to consider this question without recurring again to the often-quoted language of Chief Justice Marshall, in Gibbons v. Ogden, that "this power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." Further on the Chief Justice, in speaking of the plenary character of the specific powers granted to Congress, said: "The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess in elections, are the sole restraints on which they have relied to secure them from their abuse." This language is repeatedly quoted in the arguments and briefs on behalf of the Government, in support of the contention that this power to regulate, etc., is in effect an unlimited and absolute one. But surely it would be unreasonable to suppose that the Chief Justice had in mind, as subject to abuse, any unlimited or absolute power, but only such power as it existed under the grant of the Constitution, carrying with it such limitations as might be inherent in its nature or be prescribed in the Constitution itself. "Plenary power" may exist within such limitations, and though clearly liable to abuse within its permitted bounds, such abuse can only be corrected through the control possessed by the people at the elections. To deduce from the language quoted, authority for this contention of the Government is to attribute to the great Chief Justice opinions contrary to his expressed understanding of our dual scheme of government, and constitute him a champion of an absolutism abhorrent to the genius and character of our institutions. The contention also ignores the qualifying language contained in the definition of the power to regulate commerce, above referred to, where it says that "it acknowledges no limitation other than are prescribed in the Constitution." This extreme contention must also ignore the like qualifying language when it quotes, as it does with great emphasis, from the same opinion, the statement that "the power over commerce * * * among the several States is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of power as are found in the Constitution of the United States." We have italicized these concluding words, because they express a clear recognition by Chief Justice Marshall of the fact that the Constitution itself places limitations on the power to regulate commerce, granted by it to the Congress. But, recognizing, as he does, that these limitations exist, he says in this connection, that they do not affect the questions then before the court, and for that reason they were not further considered, the sole question for consideration in that case being whether the power given to Congress to regulate commerce was exclusive or concurrent with a like power in the State of New York, by which it assumed to deprive

citizens of other States of the right to navigate the navigable waters within the jurisdiction of said State.

We may assume, therefore, that the commerce clause of the Constitution is no exception to the general doctrine: that unlimited power has no place in American governmental institutions: and that there are rights of liberty and property that are secure against hostile legislative action. As has been well said, "In a constitutional government limitation is the abiding principle, exhibited in its highest form in the Constitution, as the deliberative judgment of the people, moderating every claim of right or use of power." (Prentice on Police Power.)

No one can read the history of the formation of the Constitution, and of the conditions from which it sprang, without being impressed with the fact that the desire to preserve the individual right of the citizens of each State to enjoy, untrammeled, that right of property which consisted in the ability to transport it into other States, free from the inhibitions and harassments that might theretofore have been imposed by the regulations of such other States, was one of the most important, if not the principal, of the impelling causes that brought about the convention of 1787. In contemplating this history the thought can not be avoided that, in conferring upon Congress and in denying to the States this power of interstate regulation, it was meant to preserve, and not to destroy or impair this important right of property, so essential to its full enjoyment and to the individual liberty of which it is a part.

These reflections are pertinent as a preparation for the inquiry: Does the Constitution prescribe any limitation on the power of Congress, as asserted by the enactment in question, of which these defendants can lawfully avail themselves?

The first ten amendments to the Constitution were admittedly intended to prevent abuse of the powers granted to the General Government, and of these, the fifth, among other things, provides: "Nor shall any person * * * be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation." These inhibitions serve as a limitation upon the exercise of federal power, whether legislative, executive, or judicial, and it is not surprising that they should be invoked as a protection against any action of the Federal Government, supposed to be injurious or destructive of the rights thus protected. No more serious and responsible duty can be imposed upon this or any court, than of determining whether, as to any given assertion of its legislative will, Congress has or has not transcended the limitations of the Constitution.

In the opinion of this court, the enactment in question is not a regulation of commerce, within the proper meaning of those words, as used in the commerce clause of the Constitution, and therefore not within the power granted by that clause. It never has been decided that the power conferred upon Congress to regulate interstate commerce, may be so expanded by construction as to warrant the prohibi-

tion of such commerce under all circumstances; and to us it does not seem to be reasonably possible that it should be. Moreover, this power, whatever its scope, certainly is subject to the limitations contained in the Constitution, and this can be said with especial emphasis as to those limitations found in amendments adopted after the ratification of the Constitution. Carroll v. Greenwich Ins. Co., 199 U. S., 401–410.

It seems perfectly plain, then, that Congress can not, in the exercise or pretended exercise of any legislative power conferred upon it, deprive any person within its jurisdiction of his liberty or property, without due process of law, nor can it be questioned that, with the possible exception of the war power, this is true, no matter under color of what power such deprivation is sought to be accomplished. No argument should be necessary, therefore, to show that this can not be accomplished by an enactment in assertion of power under the commerce clause of the Constitution. Counsel for the Government, however, contend that any enactment of Congress which purports to regulate interstate commerce, and which actually does control, restrain, or prohibit the same, or some part thereof, is such an exercise of power under the commerce clause of the Constitution as is subject to no limitation whatever, and can not be challenged by any person, on the ground that it is violative of the inhibitions contained in the fifth amendment. In other words, if it be on its face a regulation of commerce, no right of personal liberty or property can stand in the way of its enforcement, but, on the contrary, every such right is only held and enjoyed, subject to the will of Congress in the exercise of its power to regulate interstate commerce.

This is a startling proposition, but is, as we think will appear, a necessary premise to the conclusion contended for by the Government. It is admitted by counsel for the Government, that it has never yet been directly asserted in any decision of the Supreme Court, but they contend that it is deducible from certain judgments of that court, and is necessary to that fullness and completeness of control over commerce, which, begging the question, they say it was the intention of the Constitution to grant.

It may avail nothing to say that it has never heretofore been imagined that a power so formidable as this lay dormant in the Constitution, ready to be aroused and exercised at the arbitrary will or caprice of Congress, because it is true that, in the development of our modern life, clearly existing powers that have lain dormant, or have only been partially exercised, have been made applicable to conditions unforseen by those who framed the Constitution, but in these cases the powers invoked have clearly existed, and were not predicated upon the supposed exigencies for their exercise. The consequences of establishing such a proposition as one of constitutional law, may well be considered, if they be of such a character as to throw light on the intention of those who framed the Constitution, or to render it improbable that they ever meant to grant in the premises the absolute and unlimited power contended for.

It may be safely said, and we have before remarked, that the legitimate exercise of no legislative power granted by the Constitution, is capable of touching at so many points, and in such a variety of ways, the every day life and business of the citizen. It is easy to see, therefore, that if it be subject to none of the limitations of the Constitution, and especially if the constitutional guaranty of life, liberty, and property are of no avail to the citizen, rights which we have considered as most sacred and most secure may be overthrown and destroyed wantonly or arbitrarily by the will of Congress, provided that will is manifested by a regulation of commerce. It is small comfort to those who hate arbitrary or despotic power, to say that when Congress, by an enactment, has deprived the citizen of liberty or property without due process of law, it was but expressing the will of their constituents. We have, since the foundation of the Government, rested secure in the belief that there are rights which the people themselves have placed beyond the power of governmental agencies, or of the majorities for the time being behind them, to impinge upon or destroy. The provision in the fifth amendment, declaring that no person shall be deprived of life, liberty, or property without due process of law, would be a mere "rhapsody of words," without force or meaning, if so far reaching and important a legislative power as the one we are discussing can be exercised without regard to its inhibition.

It does not detract from the force of these observations to recognize that in the consideration and enforcement of these limitations and of those on the States in the fourteenth amendment the Supreme Court, as we shall presently see, has given to them that wise and common-sense application to concrete cases as they arose as makes them consistent with and not destructive of, the practical efficiency of the powers granted by the Constitution or reserved to the States.

The Constitution of the United States was intended for the common understanding of the people. The plain and obvious meaning of the words employed are to be accepted, unless plain reason to the contrary appears in the text of the Constitution itself. Life, liberty, and property are ranked together under the protection of the fifth amendment, and by the exigence of its command a person can no more be deprived of his property than he can be deprived of his life or his liberty without due process of law. But if the contention of the Government be sustained that in regulating interstate commerce all the consequences, direct as well as indirect and incidental, that injuriously affect the property of a citizen may be disregarded without respect to their character, the same must be true as to those consequences that affect his liberty. Indeed, the property rights of the citizen are a part of his personal liberty. So that a regulation of interstate commerce, not merely affecting the mode or manner of transportation, but excluding from interstate transportation altogether certain classes of persons or imposing conditions on such transportation as would wantonly and arbitrarily affect personal liberty, would have to be sustained, and even life itself might be put

in peril without redress. Here again it is not enough to say, as does the counsel for the Government, either that it is an impossibility that Congress would proceed to such an extreme or that those who so legislated would be thereafter rejected at popular elections. The amendment we are considering makes it impossible for either Congress or their constituents to do any of these things, and the deprivation of life, liberty, or property without due process of law is placed by the Constitution beyond the reach of majorities, as well as beyond the power of governmental agencies.

It is not denied that corporations are persons within the provisions of the fifth, as well as of the fourteenth, amendment (165 U. S., 150, 154), and in the cases before us it is claimed that the enforcement of the provision of the so-called "commodities clause" will violate this inhibition of the fifth amendment as to these defendants and that its enactment is therefore invalid. The facts set forth in the several answers become pertinent and necessary to the proper consideration of this claim, and to them we must again refer.

We need not dwell upon the enormous aggregate of the property to be affected by this amendment. Each individual defendant is either the direct owner or interested, directly or indirectly, in coal or coal lands to a very large extent, and it has owned these lands and possessed these interests, as we have seen, for long periods of years prior to the enactment of the clause in question. We need not repeat what we have already said in regard to the harmless character of this ownership and these interests, but we can refer to the fact that some, if not all, of these defendants were invited and encouraged by the legislature of the State of Pennsylvania to invest their funds in the coal land through which their respective railroads ran and in the coal companies who owned and operated mines contiguous to such railroads, and that two of the corporations defendant were brought into existence by the legislature of Pennsylvania—one of them three-quarters of a century ago and the other half a century ago—for the express purpose of developing the coal lands of the State so that coal might be transported to the people of Pennsylvania and of other States. It is the interstate transportation of the property thus acquired and owned that the enforcement of this act in the present proceeding seeks to enjoin and prevent.

The facts set forth in the several answers of these defendants abundantly show that no right of property of these defendants, in or to the coal owned by them, is so valuable or important as the right to transport it over their own roads. Every incident of this ownership and of this interest, as set out in the answers of the defendants, tends to enhance the value of this right It must be accepted as a fact that the coal from the mines thus owned or controlled, or in which these defendants have an interest, direct or indirect, is so situated as not to be capable of transportation, without enormous loss, by any other roads than those of the defendant owning it or interested therein. As we have before said, the exigence of the act will compel the defendants to cease mining and transporting such coal, while still

retaining their ownership or interest therein, to the incalculable injury of the great populations depending upon the marketing of such coal, or they will be compelled to surrender and divest themselves of title thereto by a compulsory sale of these coal lands and stock in coal companies. When we consider the magnitude of the sacrifice that must certainly attend such a sale, from throwing upon the market at once these properties, whose enormous aggregate value we have already referred to, it will be manifest that either alternative means a deprivation of property of enormous value by the mere command of the statute, without process of law or just compensation therefor. No refinement of argument or legal casuistry, if it were permissible in such a case, can conceal the loss directly inflicted by the enforcement of this statute, or make it anything else than a practical and substantive violation of the letter and spirit of the fifth amendment. To forbid the right to transport this commodity under the circumstances set forth in these cases is to deprive the larger part of the property owned or controlled by these defendants of a market, and therefore of its chief value. In such a situation it boots little to say that the owner is not deprived of his mere title to the coal when it has been stripped of its chief value in his hands.

Further argument is hardly needed to establish the conclusion that the necessary result of enforcing the "commodities clause" of the interstate commerce act will be to deprive the defendants of property, and likewise of their liberty as to transportation and disposition of a useful and harmless article of property—a liberty which they have always enjoyed in common with all the citizens of Pennsylvania, and under the protection of that Commonwealth, and in accordance with the usages of its people and its public policies.

The gravamen of the argument on behalf of the Government, as we apprehend it, may be stated as follows: Inasmuch as the same inhibition, as to depriving any person of life, liberty, or property without due process of law, as is applicable by the fifth amendment to the Federal Government, is made applicable also to the States by the adoption of the recent fourteenth amendment, it follows that the decisions of the Supreme Court, which have exempted in certain cases the exercise of their police powers by the States from the inhibition of the fourteenth amendment, as being outside of the scope thereof, are in point, as showing that a like exemption from limitation should be accorded to the power of Congress to regulate interstate commerce. It is further argued that this power of Congress is the equivalent of the police power, as exercised by the States with reference to subjects within their jurisdiction.

The power to regulate commerce is a distinct and substantive power granted to Congress by the Constitution, subject, as we have seen, to the limitations thereof. "It is complete in itself," like the other granted powers, while the police powers comprise that indefinite mass of powers reserved to the States, and which inhere in all civil societies for the protection of the lives, health, morals, and public interests of their members. They have their origin in the law of necessity. There

is no equivalency between them and the power to regulate commerce which does not pertain to the other granted powers. The police powers reserved to the State must always remain indefinite in character and incapable of classification or definition, from the very variety and multiplicity of the matters with which they are concerned. As said by Mr. Justice Grier in the license cases, 5 How., 632:

"As subjects of legislation they are, from their very nature, of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience, or luxury, to recede, when they come in conflict or collision. * * * The exigencies of the social compact require that such laws be executed before and above all others. It can not be supposed that the States intended by adopting that amendment (the fourteenth) to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community." See also Mugler v. Kansas, 123 U. S., 666.

When lawfully and properly enacted, their practical efficiency will not be interfered with, because they incidentally affect private property or interests. Their legitimate exercise can not be brought within the purview of the life, liberty, and property guaranties, either State or national. To do so would tend to destroy the very foundations upon which the security of those inestimable rights of the citizen must rest.

Of necessity, therefore, the courts have from the beginning been compelled in each case as it arose to determine what was or was not a legitimate exercise of its police power by a State, and in doing so, to consider whether it was enacted in good faith and was calculated reasonably to accomplish any one or more of the objects within the purview of that power.

Of necessity, too, the courts must, in determining the challenged validity of any given exercise of its police powers by a State, consider the reasonableness of such exercise, in the light of the essential character of those powers, as above described, and determine whether they have "appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens." (Patterson v. Kentucky, 97 U. S., 501, 506.) If not in direct collision with constitutional restraints, State or Federal, courts will not allow indirect and incidental consequences of such exercise of the police power to personal or property rights to affect adversely the validity of the enactments. If, on the contrary, they are in such direct collision, or constitute a "palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

If this be so, it is apparent that the argument for the unlimited character of the power conferred upon Congress to regulate commerce is not advanced by comparing it to the police powers reserved to the States. It would still be the duty of the courts to determine whether any challenged restriction of commerce by Congress was a reasonable

exercise of the power to regulate it, or constituted "a palpable invasion of rights secured by the fundamental law." The cases in the Supreme Court, involving such a consideration of the police powers reserved to the States, have been frequent, and some of those cited by counsel for the Government require a brief consideration at our hands.

It is hardly necessary to do more than refer to the full discussion of the principles to which we have above alluded, contained in the elaborate opinion delivered by Mr. Justice Harlan, for the Supreme Court, in the comparatively recent case of Mugler v. Kansas, 123 U. S., 623; because the court in that case went as far as it has ever gone, in recognizing the rights of the States in the exercise of their police powers, by recognizing the right of Kansas to entirely prohibit the sale or manufacture of intoxicating liquors, and thereby, as was alleged, to destroy the value of the brewery of the plaintiff in error, notwithstanding the due process provision of the fourteenth amendment. But, in order to uphold the validity of the law of Kansas in this behalf, the court deemed it necessary to show that it did not invade the rights secured by the fourteenth amendment, because it was a reasonable exercise of the police powers of the State. In demonstrating its reasonableness in this respect, this language of Mr. Justice Grier, in the license cases, is quoted with approval: "The true question presented by these cases, and one which I am not disposed to evade, is whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime." After stating at some length the well-known facts in regard to the pernicious character of the traffic in intoxicating drinks, Mr. Justice Harlan says: "There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional right; for we can not shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks; nor the fact established by statistics accessible to everyone, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil;" and it can not be supposed, he says, that the States intended by the fourteenth amendment to impose restraints upon the exercise of their powers for the extirpation of such evils. While it belongs to the legislative department of the States to determine primarily what are appropriate or needful exercises of their police powers, it belongs to the courts to finally determine on the reasonableness of such exercise. Though the Kansas law in question was properly found by the court, for the reasons stated, to be a valid exercise of its police powers, Mr. Justice Harlan says that the following principles must be kept in view, "as governing the relations of the judicial and legislative departments of government with each other:"

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion

of the police powers of the State. There are, of necessity, limits beyond which legislation can not rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, Sinking Fund cases, 99 U. S., 700, 718, the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in Marbury v. Madison, 1 Cranch, 137, 176, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

There can hardly be a fuller recognition of the necessity of establishing the reasonableness of a given exercise of the police power than is exhibited in this case, and of the authority of the courts, when properly invoked, to determine the same. So in Barbier v. Connolly, 113 U. S., 27, a municipal ordinance prohibiting washing and ironing in public laundries and washhouses from ten o'clock at night to six in the morning was decided to be within the scope of the police powers conferred upon the board of governors of San Francisco by the legislature of the State, and that the fourteenth amendment did not interfere with the exercise of the same. Here again the court was at pains to consider the particular facts of the case presented as bearing upon the reasonableness of this exercise of police power.

The power and duty of the court to determine the reasonableness of an exercise of the police power by a State, and the constitutional limitations which may be applicable thereto, is, on the other hand, affirmatively shown in the case of Yick Wo v. Hopkins, 118 U. S., 356. In that case a municipal ordinance to regulate the carrying on of public laundries within the limits of the municipality was decided not to be a legitimate exercise of the police power of the State, because it conferred upon the municipal authorities arbitrary power to give or withhold consent as to persons or places for the carrying on of the business, and thus was inimicable to the letter and spirit of the fourteenth amendment. In this case clearly the constitutional provision, as to the deprivation of personal liberty or property, was applied by the court because, in its judgment, the regulation in ques-

tion was not a reasonable, and therefore not a legitimate, exercise of the police power.

Anything like a general review of the cases in which the Supreme Court has dealt with the limitations upon the exercise of the police power of the States, by the provisions of the fourteenth amendment, or by the exclusive character of the power conferred upon Congress by the commerce clause itself, would unduly prolong this opinion. We will not refrain, however, from quoting the admirable statement made on this subject, contained in the opinion delivered for the court by Mr. Justice Day, in Dobbins v. Los Angeles. That was a case in which a municipal ordinance had fixed the limits within which gas works might be erected. A subsequent ordinance was adopted, amending the former one, by which latter the territory in which the works were in course of erection was excluded. This ordinance was held to be void as an arbitrary and discriminatory exercise of the police power of the State, which amounted to an impairment of property rights protected by the fourteenth amendment. Recognizing the doctrine that every intendment is to be made in favor of the lawfulness of the exercise of the police powers of a State, Mr. Justice Day proceeds as follows:

"But notwithstanding this general rule of law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments, undertaking to regulate useful business enterprises are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property. In Lawton v. Steele, 152 U. S., 133, 137, Mr. Justice Brown, speaking for the court, said upon this subject:

"'To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.'

"And again, in Holden v. Hardy, 169 U. S., 366, 398, the same justice, again speaking for the court, said:

"'The question in each case is, whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination or the oppression or spoliation of a particular class.'"

The learned justice then quotes with approval from the opinion of the supreme court of California, in the case In re Smith, decided May 31st, 1904, the following language:

"But, running current with this principle" (that the courts will not interfere with state laws within the scope of their legislative power), "and to be read with it, is one of equal importance, namely, that when the police power is exerted to regulate a useful business or occupation, the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue any trade, business, or vocation, which in itself is recognized as innocent and useful to the community. It is always a judicial question if any particular regulation of such right is a valid exercise of police power, though the power of the courts to declare such regulation invalid will be exercised with the utmost caution, and only where it is clear that the ordinance or law declared void passes the limits of the police powers and infringes upon rights guaranteed by the Constitution."

These cases, in regard to the police power of the States and the restraints imposed thereon by the fourteenth amendment, are exceedingly pertinent, as that power is at least as broad as the power of Congress to regulate commerce.

The cases cited by the Government, from Gibbons v. Ogden down to the present time, which recognize the doctrine of that case, that the power granted by the commerce clause of the Constitution is exclusive of any like power remaining in the States, have manifestly no bearing upon the question we are now considering, viz, whether the power of Congress under the commerce clause is unlimited, as contended for by counsel for the Government, or is subject to those "restrictions on the exercise of the power" which Chief Justice Marshall says "are found in the Constitution of the United States." No further reference need be made to them, except to point out that, by the recognition of the exclusiveness of this power, a further and distinct limitation is placed upon the exercise by the States of their police powers.

But it is further said in the argument for the Government that the unlimited power of Congress over interstate commerce is illustrated in the embargo cases, and the question whether Congress could prohibit all commercial intercourse between the States, and thus destroy what it was only empowered to regulate, is answered by saying that the question supposes an impossibility, and the authority of Chief Justice Marshall is again invoked for the proposition which they formulate, as follows: "That the policy of Congress in the enactment of a law is not within the judicial cognizance; that though all power granted to any department was liable to be abused, the remedy must be found at the ballot box." We have already quoted Chief Justice Marshall's precise language in this respect, and have shown that he was speaking of the abuse of the power, as it existed under the grant of the Constitution, subject to those limitations inherent in its nature, or prescribed by the Constitution itself, and that if abused

within its permitted bounds, such abuse could only be corrected by the people at the polls.

We need not enlarge upon the argument derived from the acquiescence in the embargo and nonintercourse acts. It is true that both the power conferred to regulate commerce with foreign nations and with the Indian tribes and the power to regulate the same among the States are conferred in the same clause and by the same terms, and while the one is as complete as the other, each is complete with reference to the peculiar nature of its own subject-matter. The power to prohibit foreign commerce, in part or in whole, may in one aspect of it be part of the war power, and in another result from the inherent and necesssary power recognized by international law in an independent nation to control its intercourse with foreign nations to any extent, by treaty or otherwise, even to the extent of prohibiting all intercourse therewith. We hazard nothing in saying that the power to regulate commerce among the States could not be exercised to this extreme limit. The fundamental principles lying at the foundation of the union of States and the purposes for which such union was formed, as well as the whole scheme of our constitutional government, insure the perpetuity of the freedom of commercial intercourse between the States, subject only to the legitimate control of Congress under the power to regulate the same. No case yet decided by the Supreme Court asserts the unlimited power of Congress under the commerce clause that is here contended for. On the contrary, the court has frequently asserted in varying language that the power to regulate commerce is subject to all the limitations imposed by the Constitution, and among them that of the fifth amendment. The language of the court in Monongahela Nav. Co. v. U. S., 148 U. S., 336, expresses the position assumed in all the cases touching this matter. It is as follows: "Like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the fifth amendment we have heretofore quoted."

All the argumentation of counsel for the Government in support of the validity of this legislation would be equally applicable to any assertion of the power of Congress to regulate commerce, however arbitrary it might be, or to whatever extent, by prohibition or otherwise, it might affect the liberty or property of the citizen. If, as the Attorney-General contends, the power of Congress to prohibit interstate commerce is as absolute as that exercised over foreign commerce in the embargo and nonintercourse acts, Congress may, for any reason or no reason, prohibit, in whole or in part, the interstate transportation of necessary and harmless commodities and restrain the liberty of the citizens of the several States or of certain classes of them from engaging in interstate commerce therein. If the propositions laid down by the Attorney-General are sound, it is hard to conceive upon what ground legislation could be challenged which arbitrarily prohibited farmers from carrying their own corn by their own teams to market across the boundary line between their own and another

State. Such a power would be a mockery of the purposes for which the Constitution was formed and destroy that freedom of interstate trade which it was intended to secure.

Counsel cite the so-called "lottery case," 188 U. S., 321, in support of their extreme contention, but even a cursory reading will show how far short of answering this purpose was the judgment in that case. The court decided that though the power to regulate lotteries and to permit or prohibit the sale of lottery tickets was exclusively within the jurisdiction of the police power reserved to the States, yet lottery tickets, in view of their essential character as written certificates, were articles of value in the hands of the holder thereof, were the subjects of traffic, and therefore commerce, and the regulation of the carriage of such tickets from State to State was a legitimate regulation of commerce among the States. The court, then, in addressing itself to the question whether Congress, under the power of regulation, could prohibit the carriage of such articles entirely from State to State, in the exhaustive and erudite opinion written by Mr. Justice Harlan, said (the italics being ours):

"In determining whether regulation may not under *some* circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the act of May 2, 1895, to suppress can not be overlooked. When enacting that statute Congress no doubt shared the views upon the subject of lotteries heretofore expressed by this court. In *Phalen* v. *Virginia*, 8 *How.*, 163, 168, after observing that the suppression of nuisances injurious to public health or morality is among the most important duties of government, this court said: 'Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple.' In other cases we have adjudged that authority given by legislative enactment to carry on a lottery, although based upon a consideration in money, was not protected by the contract clause of the Constitution; *this, for the reason that no State may bargain away its power to protect the public morals*, nor excuse its failure to perform a public duty by saying that it had agreed, by legislative enactment, not to do so. *Stone* v. *Mississippi*, 101 *U. S.*, 814; *Douglas* v. *Kentucky*, 168 *U. S.*, 488.

"If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Con-

stitution. What provision in that instrument can be regarded as limiting the exercise of the power granted? What clause can be cited which, in any degree, countenances the suggestion that one may, of right, carry or cause to be carried from one State to another that which will harm the public morals? We can not think of any clause of that instrument that could possibly be invoked by those who assert their right to send lottery tickets from State to State, except the one providing that no person shall be deprived of his liberty without due process of law. We have said that the liberty protected by the Constitution embraces the right to be free in the enjoyment of one's faculties; 'to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts that may be proper.' *Allgeyer* v. *Louisiana*, 165 *U. S.*, 578, 589. But surely will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals.

* * * * * * *

"As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, *for the purpose of guarding the people of the United States against the 'widespread pestilence of lotteries'* and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce."

Here, as in the cases in relation to the exercise by the States of their police powers, in view of the "due process" provision of the fourteenth amendment, the Supreme Court has felt itself compelled to consider the reasonableness of this particular exercise of the power of Congress to regulate interstate commerce, in view of the nature of that power and of the "due process" clause of the fifth amendment. If this power of regulation is as absolute as contended for by the Government, and acknowledges none of the limitations prescribed by the Constitution, of which Chief Justice Marshall speaks in defining that power, the elaborate and convincing argument of the opinion in the lottery case, to show that interstate commerce should not be made available for the promotion of a pestilential form of gambling, destructive alike of the morals and material interests of the people, was wholly unnecessary. It would have been sufficient to say that the power was absolute and free from any limitation except the will of

Congress, and that the reasonableness of its exercise was not a matter for judicial discussion or determination.

This harmful character of lotteries was judicially recognized as far back as 1833, by the Court of Errors and Appeals of Delaware (1 Harr., 65), in a case from which the following language is quoted and approved by the Supreme Court, in Patterson v. Kentucky, 97 U. S., 508. The Delaware court said:

"At the time Yates and McIntyre made contracts for the lottery privileges set forth in the bill, we had in force an act of assembly prohibiting lotteries, the preamble of which declares that they are pernicious and destructive to frugality and industry, and introductive of idleness and immorality, and against the common good and general welfare. It therefore can not be admitted that the plaintiffs have a right to use an invention for drawing lotteries in this State, merely because they have a patent for it under the United States. A person might, with as much propriety, claim a right to commit murder with an instrument, because he held a patent for it as a new and useful invention."

That this was the particular ground upon which the decision in the Lottery case was based, is emphasized by the reference made in the opinion of the court to the act of Congress of May 29th, 1884, prohibiting railroad companies or steam or sailing vessels from receiving, for interstate transportation, any live stock affected with contagious or infectious diseases, and especially the disease known as pleuro-pneumonia. This act was referred to in the case of Reid v. The State of Colorado, 187 U. S., 137, in which it was decided that the act of that State, forbidding the introduction of cattle with infectious or contagious diseases, was constitutional, the court saying in its opinion: "It is said that the defendant has a right under the Constitution of the United States to ship live stock from one State to another State. This will be conceded on all hands. But the defendant is not given, by that instrument, the right to introduce into a State, against its will, live stock affected by a contagious, infectious, or communicable disease."

It should not escape observation and comment that the traffic in lottery tickets, as prohibited by Congress, was regarded as malum in se. It was pernicious and immoral in those who received those tickets in interstate transportation, as well as in those who issued and consigned them. The extirpation of such a traffic was, as said by Mr. Justice Harlan, a legitimate exercise, both of the police power of the State and of the like power of Congress in aid thereof under the commerce clause. Nothing like this is true of the case before us. The traffic sought to be here prohibited was admittedly, up to the time of the enactment in question, lawful, moral, and innocent at both ends thereof. The one who bought the coal from the owner who delivered the same over his own road was innocently enjoying a liberty of buying where he could buy to his own advantage, a liberty characteristic of healthy business activities everywhere. No reproach attaches or has ever attached to such conduct; indeed,

the commodities clause itself refrains from denouncing it as a crime. It will be seen from the case just cited that the reasonableness of a regulation of commerce which amounts to a prohibition of any of the commodities which may form the subject-matter of interstate commerce must be inquired into by the courts when the validity thereof is challenged, and it is also seen upon what grounds such validity can be sustained.

The practical wisdom of such an exercise of the judicial function is vindicated by its necessity. In no other way can the exercise of this vast and complete power conferred on Congress by the Constitution be kept within the limitations imposed by that instrument itself or its salutary efficiency be maintained.

The case of the United States v. 43 Gallons of Whiskey, 93 U. S., 188, cited by the Government, might have been placed upon the same ground. But the court thought it necessary to place it upon the peculiar situation of the Indians, as quasi wards of the Government, and upon the treaty-making power which was exercised by a stipulation in a treaty with an Indian tribe, that, within the territory thereby ceded, the laws of the United States, then or thereafter enacted, prohibiting the introduction of spirituous liquors in the Indian country, shall be in full force and effect.

We do not think the cases referred to under the antitrust act, such as United States v. Joint Traffic Association, 171 U. S., 571, and Addystone Pipe Co. v. United States, 175 U. S., 211, and United States v. Trans-Missouri Freight Association, 166 U. S., 290, are at all applicable to the question here at issue. They deal with the illegality of contracts or combinations made in violation of the act of Congress, sometimes called the "Antitrust law," and it is decided that that act refers to all contracts of every description, whether reasonable or unreasonable, and that courts have no right to discriminate in that regard, but, under the express language of the act, any contract in restraint of trade was within its purview.

But it is well to refer for a moment to the grounds upon which the decisions in these cases are placed. In the United States v. Trans-Missouri Freight Association, supra, after deciding that the statute was intended to apply to common carriers by railroad, the court, through Mr. Justice Peckham, says:

"The next question to be discussed is as to what is the true construction of the statute, assuming that it applies to common carriers by railroad? What is the meaning of the language as used in the statute, and that 'every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal?' It is confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include, what the language of the act plainly and in terms covers, all contracts of that nature?"

In reply to the contention that the statute should be so construed as to interdict only those contracts which were in unreasonable

restraint of trade, the court replied that its express language covered all contracts in restraint of trade, and that it was not permitted to the court to read into the statute a qualifying word which made it apply to less than all such contracts. The plain intention of the law was to protect the freedom of trade, and it thus carried out what must be admitted to be the underlying purpose of the commerce clause of the Constitution. No question was raised as to the right of Congress to thus declare unlawful all contracts in restraint of trade. In a certain sense the statute is declaratory of the common law by which for centuries such contracts have been denounced as illegal.

The United States v. Joint Traffic Association and the Addystone Pipe Co. v. United States (supra) were decided upon the authority of the case just quoted from. They concern the enforcement of the same provisions of the antitrust law and declare that private agreements between persons or corporations, tending directly, and not indirectly or incidentally, to restrain trade among the States, were unlawful. It is no longer contended that the interdiction of such contracts is not a valid exercise of the power to regulate interstate commerce. The decisions in these cases and others of the same class plainly have no bearing upon the questions we have here to consider.

It is unnecessary to discuss in detail the numerous decisions of the Supreme Court which recognize, directly or impliedly, the duty of the court to inquire into and determine the reasonableness of legislation purporting to be a regulation of commerce under the commerce clause of the Constitution as to its being properly such or as to whether it contravenes the inhibition of the fifth amendment by depriving any person of life, liberty, or property without due process of law. Among the cases relied upon by the Attorney-General in support of the "commodities clause" is the case of New Haven Railroad Co. v. Interstate Commerce Commission (200 U. S., 361). A brief review of the facts in that case and its ratio decidedi we think will show that, far from supporting the contention made by the learned Attorney-General, it distinctly fails to do so. The charge was that the Chesapeake & Ohio Railroad was engaged in the carriage of coal as interstate traffic between a district of West Virginia and Newport News, Virginia, for delivery thence to the New Haven, in Connecticut, and that the traffic was being moved at less than the published rates and in such a way as to produce a discrimination in favor of the New Haven road as against others, in violation of the act to regulate commerce and the amendments thereto. The Chesapeake & Ohio had made a verbal agreement with the New Haven to sell to that road 60,000 tons of coal, to be carried from the Kanawha district to Newport News, and thence by water to Connecticut, for delivery to the buyer at $2.75 per ton, and that a considerable portion had already been delivered and the remainder was in process of delivery. It was charged that in order to comply with this contract the Chesapeake & Ohio bought the coal at the mines and that the price paid and the cost of transportation from Newport News to

Connecticut would aggregate $2.47 per ton, thus leaving to the Chesapeake & Ohio only about twenty-eight cents a ton for carrying the coal to Newport News, whereas the published tariff for like carriage from the same district was $1.45 per ton. The petition alleged that the C. & O. asserted that, although the total price which it received for the coal covered by the verbal agreement was less than the total outlay in delivering the coal, including its published rates, such fact did not amount to a departure from the published rates and was not a discrimination for two reasons: First, because if such difference existed it was a loss suffered by the C. & O., not from taking less than its published rates, but because it had received less as a purchaser than the coal had cost; second, that even if it had not the lawful right thus to impute the payment of the price of the coal, the C. & O. had, in fact, received much more for the coal than the price in money agreed on, because at the time of the verbal agreement to sell the New Haven had a claim of $100,000 against the C. & O., which was to be extinguished by the completion of the delivery of the coal, and in this way caused the price thereof largely to exceed the cost of the coal to the C. & O., including its published rates. With his usual perspicuity, Mr. Justice White brushed aside the sophistry of the contention that by purchasing the coal at the mines the C. & O. could avoid the requirement of the act that it should not carry coal for less than its published rates, and held that where the difference between the price paid for the coal at the mines and that for which it was sold was not sufficient to cover the published freight rates for carrying the same, the charging of the full rates for the freight and entering up in their books the difference between those rates and the prices at which the coal was to be delivered in New Haven as the price actually received was a mere device in fraud of the law and was a palpable violation thereof. Accordingly, it was decreed that the contracts made by the C. & O. with the New Haven were contrary to public policy and void because in conflict with the prohibitions of the act to regulate commerce, and the C. & O. was perpetually enjoined from taking less than the rates fixed in its published tariff by means of dealing in the purchase and sale of coal.

The question, as put by the learned justice, is this: "Has a carrier engaged in interstate commerce the power to contract to sell, and transport in completion of the contract, the commodity sold, when the price stipulated in the contract does not pay the cost of purchase, the cost of delivery, and the published freight rates?" Further on it is said: "Now, in view of the positive command of the second section of the act, that no departure from the published rate shall be made 'directly or indirectly,' how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character?"

The opinion is a most interesting one, and completely demonstrates the futility of any attempt to avoid the inhibitions of the act against discriminations in freight rates by one who deals in or owns the coal to be transported, if such attempt, like any other violation of the

law, is prosecuted in the courts having jurisdiction of the same. It is true that in the opinion the duality of ownership and transportation of commodities is animadverted upon as presenting a temptation to avoid thereby the requirements of the act. But conditions or situations may not be destroyed by the mere fiat of an act of Congress, because they may create temptations for violating the law. It was one thing to say, as was said by Mr. Justice White in this case, that it did not matter, so far as it affected the power to enforce the requirements of the interstate commerce act in the case before the court, that its enforcement might make it difficult or impossible for a railroad company to transport its own coal in interstate commerce, but quite a different thing for Congress to say, in the first instance, that such coal could not be so carried at all. In one case the regrettable inconvenience to the public and injury to a private property right merely incidental to the enforcement of a valid regulation of commerce were not allowed to obstruct the same, while on the other hand—the case we are now considering—these regrettable results are sought to be brought about directly by legislative enactment, independently of any other asserted regulation of commerce. It is perfectly clear that in the application of this well-settled doctrine as to the incidental loss or injury that may result from the enforcement of valid laws, Mr. Justice White is not to be taken as, even by way of obiter dictum, sanctioning the validity of the act here in question. When he speaks of "proper rules and regulations for the segregation of the business of producing, selling, and transporting, as presented in the Haddock and Coxe cases (before the Interstate Commerce Commission), as not being confiscatory," the meaning is evident that, in the business of carrying its own coal by a railroad carrier, there should be a "segregation" of the same into such departments as would make plain in any case whether a fraud upon the law against discrimination was being practiced. The course so pointed out would have fully regulated commerce in anthracite coal without at all restraining it or depriving the carriers in question of the full enjoyment of their corporate powers and of the properties lawfully and innocently acquired thereunder. With this remedy for the supposed evil in the hands of Congress, the unreasonableness of the statute under consideration as a regulation of commerce becomes still more apparent. It extirpates and destroys an entirely lawful business, in order to stamp out the evils which may be practiced in its conduct.

Applying the philosophy of this case to those before us, it is obvious that, instead of a competent and efficient regulation of commerce, directly dealing with the evil of the situation, by explicitly forbidding and penalizing all such discriminations in freight rates as were possible of commission under guise of the ownership of the commodity carried, the enactment in question has excluded from interstate commerce all commodities owned by the carrier, whether their transportation be carried on in conformity with the legal requirements against discrimination or not. Such an exclusion can only be

justified by the assumption that a carrier who transports his own coal, as well as that of others, must discriminate. It could hardly be more unreasonable to forbid the burning of coal on the locomotives, and compel a resort to wood for fuel, because the carriage and distribution of such coal might furnish the opportunity for the attempt to discriminate in freight rates as to the coal necessarily remaining after the preparation of coal for their own steam purposes.

It has long been settled that, because the products of domestic enterprises in agriculture, manufactures, or the arts may ultimately become the subjects of interstate or foreign commerce the control of the means or the encouragements by which they are fostered and protected are not on that account within the regulative power of Congress. (Veazie v. Moor, 14 How., 573; Kidd v. Pearson, 128 U. S., 1.) A fortiori, that power can not be extended, in the guise of regulation, to the destruction of property interests which only indirectly affect interstate commerce, and this, we think, is true independently of any consideration of the effect of such a regulation as an arbitrary spoliation of property rights, within the protection of the fifth amendment.

Counsel for the Government have dwelt much upon the case of Union Bridge Co. v. United States, 204 U. S., 364, to show the unlimited character of the power to regulate commerce. The complete control of Congress under this power over the navigable waters of the United States, as highways of interstate or foreign commerce, for the purpose of keeping them clear and unobstructed for navigation has long been recognized. Any physical obstruction to or interference with their free navigation may undoubtedly be dealt with as such by Congress. These waters are public highways of the nation, and no one can be so permitted to encroach upon them as to deprive Congress of the right and power to abate the public nuisance thereby created. No one can acquire rights as to such navigable waters in derogation of the public right to navigate the same.

This was the doctrine of the Union Bridge Co. case. Its bridge, though permitted to be built at a time when it did not interfere with the navigation of the Allegheny River, afterwards, owing to the development of commerce, became an obstruction to such navigation, and as such was properly required to be so altered in height as to prevent its being an obstruction. The pecuniary loss resulting thereby to the owners was not in any proper sense a taking of private property for public use without compensation, or a deprivation thereof without due process of law under the fifth amendment.

Arguments from analogy are always to be guardedly used, as they are often misleading. The argument is seriously made that as Congress may remove a physical obstruction to navigation, like a rock or a bridge, it may call anything it chooses an obstruction, not to navigation but to commerce generally, and require its removal. It hardly needs to be pointed out that the analogy is unsound and fanciful. It would have us conclude that, because Congress can declare a rock or a bridge an obstruction to navigation, and require its removal, it may also declare the otherwise lawful carriage of their owner's harmless

commodities by the boats navigating the river to be an obstruction to commerce, and so forbid it. If, indeed, the latter may be done there is no logical nexus between the two.

The bridge may be removed as a patent physical obstruction to navigation, and so, pro tanto, an obstruction to commerce, but it could hardly be contended that Congress could, by declaring a house situated a mile back from a river an "obstruction" to its navigation, escape the inhibitions of the fifth amendment. Such an assertion of power would clearly come within the scope of the judgment in the case of Monongahela Navigation Co. v. U. S. (supra). A fortiori, Congress can not, by merely calling a theretofore lawful and harmless social or business situation an obstruction to interstate commerce, escape the inhibitions of the said amendment, in decreeing its destruction.

It is clearly a judicial question not to be avoided, whether this enactment, known as the "commodities clause," in view of the character of the discriminations made by it, as between owners of property, and of the inhibitions of the fifth amendment to the Constitution, is a reasonable exercise of the power conferred upon Congress to regulate interstate commerce. Passing its discriminatory features, we confine ourselves to the consideration whether the enactment in question is violative of any right of the defendants within the protection of the fifth amendment. The facts appearing in these several cases, in regard to the history of the character and extent of the ownership and interests in coal and coal lands of these defendants that will be injuriously affected by the enforcement of this law, render it impossible to say that there has not been a deprivation, as to each of them, of its liberty and its property, within the meaning of that clause of the fifth amendment which forbids that any person shall be deprived of life, liberty, or property without due process of law.

It is to be observed in the first place, that the act is in a certain sense retroactive. It applies to or affects property lawfully acquired long prior to the date of its enactment and lawfully and innocently enjoyed under the sanction of the laws of Pennsylvania during long periods of years prior thereto, and is not confined to the dual ownership of transportation and property acquired after the passage of the act. In forbidding the defendants to transport in interstate commerce the products of the mines owned by them, or in which they are directly or indirectly interested, it can not be doubted, from the facts stated in the records before us, that a most important, if not the most important, property right attaching thereto is stripped from these defendants. As we have before said, it is to no purpose to assert that they are not, by force of this enactment, deprived of the legal title to these various properties. Courts "are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority." It is perfectly clear, from the conditions as stated under which these coal lands, mines, and

interests in coal companies are held by these defendants, that the deprivation of the right to carry their products in interstate commerce is a deprivation of the most valuable property right attaching thereto. It is urged by the Government, however, that the defendants may divest themselves of these properties by selling the same. Such a suggestion seems only to emphasize the arbitrary and despotic character of the legislative act. The thing commanded bears no relation to that which is within the power of Congress to prescribe.

The regulation must be within the restrictions of the Constitution, reasonably construed in application thereto. In determining this question of reasonableness, the carefully considered expert opinion of the Interstate Commerce Commission is entitled to great weight. In distinguishing the case of Grain Rates of Chicago Great Western Ry. Co., 7 Inters. Com. Rep., 33, from those of Haddock v. D. L. & W. R. R. Co., 3 id., 302, and Coxe Bros. & Co. v. Lehigh Valley R. R. Co., 3 id., 460, the learned commission said:

"Those cases are in no respect similar to this. In both, the common carrier was also the owner of extensive coal fields, and indeed it had become a common carrier largely for the purpose of transporting the product of those mines to market. This state of things existed before the passage of the act and had no reference to the act. Unless the carrier was permitted to transport its coal, the result would be in effect the confiscation of its property, and to order it to charge itself with a particular rate would merely result in a matter of bookkeeping. Under these circumstances it was held that the only remedy was to enquire whether the rate charged the complainant was a reasonable one."

Even if wrong in their conclusion, as intimated by Mr. Justice White, that an enforcement of the prohibition against discrimination in rates, under proper rules and regulations for the separation of the business of producing, selling, and transporting into appropriate departments, would have amounted to an interdiction on the carrier as to carrying his own coal, and have been, therefore, confiscatory in its results, this does not detract from the force of the judgment expressed by the commission, that if the operation of the act were such as to interdict the interstate carrying of coal by the railroad carriers owning or interested in the same, it would be practically a confiscation of its property. Yet this is just what the "commodities clause," not indirectly, but directly, does.

As said by one of the counsel who argued these cases at the bar, "to prevent favoritism and discrimination it is not necessary to deprive the carrier of its right to transport its own commodities; to render useless hundreds of millions of dollars of its improvements; or practically to destroy the value of property by forbidding its transportation." The provision that no person shall be deprived of liberty or property without due process of law would, indeed, be shorn of its vitality if the contention of the Government in the premises can be sustained. If, without regard to the exigence of the fifth amendment,

we merely compare the consequences of this so-called regulation of commerce to the property and property rights of these defendants, with what we are told is the end to be achieved by this so-called regulation of interstate commerce, the utter unreasonableness of the said regulation will still more clearly appear. A property right of almost incalculable value, which these defendants have hitherto innocently enjoyed in common with the citizens of Pennsylvania and of all the other States, is stricken down for the alleged purpose of preventing discrimination by common carriers, as owners and carriers of such property, as against others who may lawfully require their services. It hardly needs pointing out how enormous the disparity between the value and importance of the end accomplished and the cost of the means employed for the accomplishment; and this, too, when any such discrimination, if it exists, can be remedied by regulations bearing a direct relation thereto. But to further make the disparity between the means and the end to be accomplished more apparent, it is not because such discriminations are practiced, but because they possibly may be practiced.

From every point of view from which we have been able to approach the question, the unreasonableness and consequent invalidity of this so-called "commodities clause" is apparent. It invades the rights of the State by striking down the liberty hitherto innocently enjoyed by its citizens under the laws and usages of the Commonwealth, to engage in interstate commerce to the fullest extent, as to all harmless articles, whether owned or not owned by the carrier, and deprives of their property these defendants contrary to the letter and spirit of the fifth amendment to the Constitution. If the enactment in question be warranted by the commerce clause of the Constitution, it is hard to see what bounds may be set to the exercise of that power. It will indeed be an open door, through which the forces of a centralization hitherto unknown may enter at will, to the overthrow of that just balance between federal and state power, for which the makers of the Constitution so wisely provided as an essential to the preservation of our dual form of government.

We confine ourselves to the concrete facts presented by the pleadings in these cases, and intimate no opinion either way, as to cases where property has been acquired by the carriers subsequent to the passage of the act. For the reasons stated, therefore, these bills in equity are dismissed, and the petitions for writs of mandamus on the law side of this court are denied.

DALLAS, Circuit Judge, concurring.

I fully concur in the foregoing opinion, and the little now to be added is intended merely to accentuate my acceptance of it.

It was held in the Lottery case (188 U. S., 321) that the power of Congress to regulate commerce among the States is plenary, and is subject only to such limitations as the Constitution imposes upon its exercise; but it was not held that the power committed to Congress

to prescribe the rules by which interstate commerce is to be governed, authorizes the interdiction of its pursuit by any person or persons, natural or artificial, without regard to the character of the traffic sought to be proscribed. It was decided, it is true, that the prohibition of the carriage of lottery tickets is an "appropriate mode for the regulation of that particular kind of commerce;" but it was not decided that prohibition, apart and distinct from regulation, may be ordained, or that as a mode for regulation it would universally, or even generally, be appropriate. On the contrary, it was said that, "in determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic * * * can not be overlooked." Where it is "a kind of traffic which no one can be entitled to pursue as of right," its pursuit by anyone may be prevented; this the Lottery case has established; but that a common carrier may be forbidden to transport from one State to another any article or commodity, however useful and inoffensive, which Congress may choose, no matter with what motive, to exclude from such transportation, neither the Lottery case nor any other has determined.

The prohibitory intent of the piece of legislation under consideration is too plain for disavowal, and the suggestion that what it prohibits is not interstate commerce, but interstate transportation by a railroad company of commodities which it has produced, etc., is delusive. The question is not whether the carriage from State to State of coal produced by the carrier is interstate commerce, for of course it is; but whether, being a kind of commerce which is not inimical to safety, health, or morals, and which, therefore, anyone is entitled to pursue "as of right," Congress may restrict a railroad company's interstate transportation of coal to coal not mined or owned by it and in which it has no interest. Any such restriction, whatever it may be called, in its nature and effect is discriminative prohibition; and that the restrictive provision now in question was enacted, not actually for the regulation of interstate commerce, but really to coerce the conformity of intrastate business with a "policy" approved by Congress, seems practically to be admitted, and could not, with candor, be denied.

"While every possible presumption is to be indulged in favor of the validity of a statute, the courts must obey the Constitution rather than the law-making department of government," and they have been charged with no duty more exalted or imperative than that of resolutely resisting the assumption by that department of any power not delegated to it by the Constitution, let the pretext or ostensible object be what it may. No court has authority, under the guise of interpretation, to change the Constitution for the purpose of meeting a supposed requirement of present conditions, and the covert tendency of any usurpation of such authority would inevitably be to transform the government of enumerated powers which the Constitution established into a government with all power vested in its legislative

and executive branches. But there are rights not derived from the Constitution, though they may be secured by it, which in any free government must be conceded to be beyond invasion by any of its departments (Loan Association v. Topeka, 87 U. S., 662), and the inherent right of the States to unrestricted innoxious commercial intercourse never has been relinquished nor made dependent upon the sufferance of the body to which its regulation was confided, not for its suppression in whole or in part, but to foster its benefits and preclude its obstruction. The right itself was "retained by the people," and by no subterfuge can any of the people, whether incorporate or not, be deprived of it. Moreover, the States, subject only to the powers delegated to the United States by the Constitution, or prohibited by it to the States, have severally the right, within their respective geographical limits, to the administration of their own law for the maintenance and defence of life, liberty, and property, and consequently Congress, unless in aid of the unfeigned exercise of a power possessed by it, has no authority whatever to divest, limit, or impair any property right which competent state law recognizes and protects. Yet we are confronted in these cases with an attempt to subvert by congressional edict the right to use and enjoy property of the utmost value, which was acquired and has long been held under state law of unquestionable validity, and to withhold from the people of many of the States a commodity which has aptly been characterized as "a prime necessity of life and an essential of civilization." Such legislation is incompatible with free government (Loan Ass. v. Topeka, supra), and, in my opinion, it is simply impossible to find support for it in a grant of power to regulate commerce, coupled with a mandate that private property shall not be taken for public use without just compensation, and that no person shall be deprived of liberty or property without due process of law. The inclination sometimes manifested to centralize power in the General Government results in great measure, no doubt, from the apparent expediency of committing to it the correction of ills which it is supposed that the States can not so readily repress; but the achievement of no presently desired end, however salutary, can justify the infraction of our fundamental law, or warrant its perversion by insidious construction. The Constitution of the United States is a written instrument, not a progressive development, and the often quoted epigram that "Constitutions are not made, but grow" should not apply to it.

BUFFINGTON, Circuit Judge, dissents.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April sessions, 1908.

UNITED STATES OF AMERICA v. DELAWARE & HUDSON COMPANY.	In Equity, No. 85. At Law, No. 202.
UNITED STATES OF AMERICA v. ERIE RAILROAD COMPANY.	In Equity, No. 87. At Law, No. 204.
UNITED STATES OF AMERICA v. CENTRAL RAILROAD OF NEW JERSEY.	In Equity, No. 89. At Law, No. 206.
UNITED STATES OF AMERICA v. DELAWARE, LACKAWANNA AND WESTERN RAILROAD Company.	In Equity, No. 91. At Law, No. 208.
UNITED STATES OF AMERICA v. PENNSYLVANIA RAILROAD COMPANY.	In Equity, No. 95. At Law, No. 212.
UNITED STATES OF AMERICA v. LEHIGH VALLEY RAILROAD COMPANY.	In Equity, No. 97. At Law, No. 214.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.
Dissenting opinion, by BUFFINGTON, C. J.

BUFFINGTON, C. J.

These cases involve the constitutionality of the fifth paragraph of the first section of an act of Congress, approved June 29, 1906, which provides: "From and after May 1, 1908, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

In Brown v. Walker, 70 Fed. Rep., 46, where the constitutionality of the immunity clause of the interstate commerce act, already held unconstitutional in another jurisdiction (60 Fed. Rep., 257), came

before Judge Acheson and myself, we said: "When a statute has been passed by the legislative branch of the Government, the judicial branch will act with great caution in declaring it unconstitutional, and will do so 'only,' as Chief Justice Black said in Sharpless v. Mayor, etc., of Philadelphia, 21 Pa. St., 164, 'when it violates the Constitution clearly, palpably, plainly, and in such manner as to leave no doubt or hesitation on our minds.' For, as Chief Justice Marshall said in Fletcher v. Peck, 6 Cranch, 126: 'The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.'" This extract states my attitude toward the act now before this court.

That act is an alleged exercise of power under the eighth section of article 1 of the Federal Constitution, which conferred on Congress power "to regulate commerce * * * among the several States." Its subject-matter is, "any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced" by an interstate railroad, or "which it may own in whole or in part, or in which it may have any interest, direct or indirect." That it affects such articles only when they have reached a commercial stage, viz, are "manufactured, mined, or produced," and become subjects of interstate commerce, viz, by carriage, "from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country," the act provides. And that such commodities are articles of commerce is clear: Gibbons versus Ogden, 9 Wheat., 1. These commodities, the act says, it shall be unlawful for any railroad to transport between the States when "manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect." It does not forbid a railroad to own or operate mines or manufactories. It does not preclude sale of its product or debar carriage thereof from the State. It simply puts the carrier-owner on the basis of all other owners and shippers of commodities, viz, transportation of its and their product by a disinterested carrier. Its manifest purpose is to prevent, in shipments, favor to any, and secure fairness to all.

At this point we note that the prior action of any State authorizing such carrier to own manufactories or mines could in no way detract from the power of Congress to thereafter regulate interstate commerce. Manifestly, such purchases under State authority created no obligation or contract on the part of Congress that it never would, in

pursuance of its power to regulate commerce between the States, enact laws which might restrict carriers from the interstate carriage of their own products. Mere inaction, mere omission to exercise a constitutional power, can not estop that body, for such a doctrine of congressional estoppel would compel it to forestall the laws of every State and seriously impair the exercise of the power to regulate commerce. In effect it would place in each State a veto on the power to regulate conferred on the United States. The contention for congressional estoppel is best answered by Mr. Justice Harlan in Union Bridge Company v. United States (204 U. S., 400), where he says: "There are no circumstances connected with the original construction of the bridge, or with its maintenance since, which so tie the hands of the Government that it can not exert its full power to protect the freedom of navigation against obstructions. Although the bridge, when erected under the authority of a Pennsylvania charter, may have been a lawful structure, and although it may not have been an unreasonable obstruction to commerce and navigation as then carried on, it must be taken, under the cases cited, and upon principle, not only that the company when exerting the power conferred upon it by the State did so with knowledge of the paramount authority of Congress to regulate commerce among the States, but that it erected the bridge subject to the possibility that Congress might, at some future time, when the public interest demanded, exert its power by appropriate legislation to protect navigation against unreasonable obstructions. Even if the bridge, in its original form, was an unreasonable obstruction to navigation, the mere failure of the United States at the time to intervene by its officers or by legislation and prevent its erection, could not create an obligation on the part of the Government to make compensation to the company if, at a subsequent time, and for public reasons, Congress should forbid the maintenance of bridges that had become unreasonable obstructions to navigation. It is for Congress to determine when it will exert its power to regulate interstate commerce. Its mere silence or inaction when individuals or corporations, under the authority of a State, place unreasonable obstructions in the waterways of the United States, can not have the effect to cast upon the Government an obligation not to exert its constitutional power to regulate interstate commerce except subject to the condition that compensation be made or secured to the individuals or corporation who may be incidentally effected by the exercise of such power. The principle for which the bridge company contends would seriously impair the exercise of the beneficent power of the Government to secure the free and unobstructed navigation of the waterways of the United States. We can not give our assent to that principle."

But in the present cases we have a different situation. The purpose of this federal statute of 1906, to divorce, in interstate commerce, the dual relation of carrier and producer, was anticipated by intrastate legislation thirty-odd years before by the State of Pennsylvania. In its constitution of 1874 (sec. 5, art. 17), that State

provided that "No incorporated company doing the business of a common carrier shall, directly or indirectly, prosecute or engage in mining or manufacturing articles for transportation over its works, nor shall such company, directly or indirectly, engage in any other business than that of a common carrier, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business; but any mining or manufacturing company may carry the product of its mines and manufactories on its railroad or canal not exceeding fifty miles in length." The effect of this constitutional provision upon the legality of the purchase of lands by carriers has never been passed upon by the supreme court of that State. Assuming it was not self-operative in the sense that it required legislation to enable the State to forfeit title to lands acquired in the face of it, for this alone was decided in Commonwealth v. New York, Lake Erie & Western Railroad Company, 132 Pa. St. 591, yet certain it is it strips every purchase in Pennsylvania since 1874 of mining properties by common carriers of the status of innocent purchases, and the answers do not allege that the purchases of these respondents were all prior thereto and whether or not they had elected to accept the provisions of the Constitution. Now the object of this federal statute is clear. It seeks, in the sphere of interstate commerce, and, be it observed, in it alone, to enforce proper service by carriers of such commerce, by divorcing their public duty as common carriers from their private interest in carrying their own products. It forbids them to become competitors of their own customers. Such carriers are created and vested with public rights to enable them to serve as common carriers. "The question," say the Supreme Court in Cherokee Nation v. South Kansas Railroad Company, 135 United States, 657, "is no longer an open one as to whether a railroad is a public highway, established primarily for the convenience of the people and to subserve public ends." So far as this dominant, public purpose is concerned, their lawful ownership of private property is an incident to enable them to fulfill, certainly not to thwart, this public duty. "Though the corporation, in respect to its capital, is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold land was conferred that these objects might be worked out:" Western Union Telegraph Company versus Pennsylvania Railroad Company, 120 Fed. Rep., 367, quoting Railroad v. Colwell, 39 Pa. St. 339. Now, rightly or wrongly, Congress determined that the interstate carriage of the commodities produced from carriers' property injuriously affected their public duty and enacted that the full enjoyment of the secondary and private right of private carriage must yield to the primary and higher requirement of public duty. Of the wisdom of that body in adopting the particular course of the statute, the courts can not inquire. "The question is for us one of power only, and not of policy:" United States v. Joint Traffic Association, 171 United States, 505, for, as said of the interstate commerce act by Mr. Justice White in the New Haven Railroad

Company v. United States, 200 United States 399, "If the result of applying the prohibitions as we have interpreted them will be practically to render it difficult, if not impossible, for a carrier to deal in commodities, this affords no ground for relieving us of the plain duty of enforcing the provisions of the statute as they exist. This conclusion follows, since the power of Congress to subject every carrier engaging in interstate commerce to the regulations which it has adopted is undoubted." That the regulation of interstate commerce was the object of this law is clear. When it was under consideration the mover of the amendment said it was intended "to divorce transportation from production on the part of the railroads engaged in transporting coal they mined and sold in competition with other shippers, which was a great abuse. This abuse grew into a grievous wrong to independent shippers. I sought to correct this abuse by an amendment confining railroads to their legitimate business of transporting freight and passengers and prohibiting them from engaging in the transportation of any commodity which they might own, except for their own use." Indeed, the dual and conflicting relation of public carrier and private producer was a matter of common observation. We have seen how it had been constitutionally forbidden in Pennsylvania in 1874. In the case of the Attorney-General of Great Britain v. The Great Northern Railway Company, 29 Law Journal (N. S. Equity), 794, decided in 1860, the question was whether dealing in coal by a railroad was illegal because incompatible with its duty as a public carrier and calculated to injure the public. It was there held that the act of Parliament granting the charter to operate the railroad implied a prohibition against the company engaging in any other business, the court saying: "These large companies, joint stock companies generally, for whatever purpose established, and more particularly railway companies, are armed with powers of raising and possessing large sums of money—large amounts of property—and if they were to apply that money or that property to purposes other than those for which they were constituted, they might very much injure the interests of the public in various ways. * * * Here we find this company, having the traffic from the north of England, where the great coal fields are (at least some of the principal coal fields), supplying the country with coal, or capable of supplying it. This company buys the coal, which gives to the company an interest in checking, as much as possible, those who will not deal with them; and it is quite clear that it is possible, by the mode in which this company may (I will not say has)—but by the mode in which this company may exercise such powers as either it has or assumes to have—this company may get into their hands the traffic—that is, the dealing—in all the coal in the large districts supplying coal to the country. They have to a considerable extent done so, and there is no reason why it should not go on progressing. I observe that in the six years from 1852 to 1857, inclusive, the amount of their coal business has increased from 73,000 tons to 794,000 tons; and there is no reason, as the affidavits show, why they

should not—there is great danger that they may—get into their hands the entire business in the coal of all that district of country. * * * There is, therefore, great detriment to the interests of the public, for this reason, taking merely the article of coal." Accordingly an injunction was granted, and no case to the contrary being cited, it would seem that its principles now are, and since 1860 have been, the law of England on the dual relation of common carriers. Moreover, this dual relation of public carrier and private producer was involved in the case of New Haven Railroad Company v. United States, supra, and in discussing its effect on the requirement of the interstate commerce act that the carrier adhere to published rates, Mr. Justice White said: "The existence of such a power in its essence would enable a carrier, if it choose to do so, to select the favored persons from whom he would buy and the favored persons to whom he would sell, thus giving such persons an advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. Indeed, the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly. To illustrate: If a carrier may by becoming a dealer buy property for transportation to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of the commodity, it must result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer. No other person owning the commodity being thus able to ship on equal terms, it would result that the owners of such commodity would not be able to ship, but would be compelled to sell to the carrier."

In the light of these views, it must be presumed, for every presumption of the integrity of purpose of the lawmaking power must be made, that Congress in passing this act sought not to confiscate private property, but rather to avert by due regulation the evils the carrier had itself brought about by allowing private interest to injuriously affect public duty. And while, as we have said, the wisdom or otherwise of Congress in the measures it adopts is not a subject of judicial scrutiny, for "in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed:" Lottery case, 188 U. S., 353, yet the recognition by courts of an evil to be remedied and the avowed purpose of Congress to stop such evil may throw some light on that which, after all said, is a question of fact rather than law, namely, whether this act is a real regulation of commerce, or under the guise of regulation, a prohibition of holding property. And as bearing on the conditions

in view of Congress, the facts set forth in the answer of one of the defendants are highly suggestive, viz: "This defendant, further answering, says that anthracite coal is an article of prime necessity, and is universally used for domestic purposes throughout New England and the Middle Atlantic States, and to a great extent throughout other sections of the country. The source of the entire supply, save a few small deposits of inferior quality, is located within the State of Pennsylvania, and the deposits extend over an area of only about 484 square miles, divided for trade purposes into three 'regions,' the Wyoming (sometimes called the Lackawanna) region, the Lehigh region, and the Schuylkill region. Ninety per cent, approximately, of the entire unmined area of anthracite coal is owned or controlled by the following-named companies or by 'subsidiary coal companies,' so called, that is, companies in which they have an entire or controlling stock interest, viz, the Reading Company, the Pennsylvania Railroad Company, the Delaware, Lackawanna & Western Railroad Company, the Lehigh Valley Railroad Company, the Central Railroad of New Jersey, the Delaware & Hudson Company, the Erie Railroad Company, and the New York, Ontario & Western Railroad Company, and from 70 to 75 per cent of the annual supply of anthracite coal in the United States is, and for many years past has been, produced either directly by said companies, as in the case of the Delaware, Lackawanna & Western Railroad and Delaware & Hudson companies, or through the agency of the said 'subsidiary' coal companies."

Such facts may have been ground in the mind of Congress to justify restricting transportation regulations, when it saw that these private acquisitions by public carriers, up to 90 per cent of the entire anthracite supply, had resulted from the mere inaction of Congress to restrict carriers in their interstate relations to their public and primary service of transportation. The facts set forth in this answer disclose a greater and more significant absorption than that in the English case, of which the Supreme Court, in New Haven Railroad Company v. Interstate Commerce Commission, supra, said: "Here it is unquestioned that the Chesapeake & Ohio, as a result of its being a dealer, had become, long prior to the adoption of the interstate commerce law and continued to be thereafter, up to the passage of the West Virginia statute prohibiting a carrier from dealing in coal, virtually the sole purchaser and seller of all the coal produced along the line of its road. That this result was not merely accidental, but was in effect engendered by the power of the carrier to deal and transport a commodity, is illustrated by the case of the Attorney-General v. the Great Northern Railway Company, 29 Law Journal (N. S. Equity), 794."

But apart from authoritative statements, it must be clear to thoughtful men that the conduct of a carrier is the most vital and essential requirement to fair enjoyment of the benefits of commerce. Such being the case, it is equally clear that to be effective the power to regulate commerce must include ability to regulate the carrier, for

to exclude it strips the power to regulate of all remedial strength. Regulation of the carrier, then, being essential to the power to regulate commerce, and the regulation of commerce between all States being delegated by the Constitution to the United States, it follows that any control or regulation of a carrier by a State which affects the performance of the carrier's interstate service is unconstitutional. "In a large proportion of the cases in respect to interstate commerce brought to this court," say the Supreme Court in in re Debs, 158 U. S., 564, "the question presented was of the validity of State legislation in its bearings on interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce." It is clear, therefore, that if the act now before us, which makes it "unlawful for any railroad company to transport from any State * * * to any other State * * * any article or commodity * * * manufactured, mined, or produced by it," etc., had been passed, for example, by the State of Pennsylvania, it would be unconstitutional, because by circumscribing the carrier's power and regulating its duty in the interstate carriage of commerce, that State exercised power to regulate commerce between States which the Constitution committed to the United States. We are not, therefore, embarrassed in this case by any question of trenching on the right of a State. Such being the case, one of two results must follow—either the right to regulate the interstate carrier's efficient performance of duty rests in Congress and its regulation must prevail, or no power to regulate interstate carriers exists, and the carriers "are a law unto themselves." Unfortunate as this would be, yet the nonexistence of a power affords no ground for vesting such power in Congress. But there is neither warrant or necessity for such fallacious reasoning. The federal power rests on the sound and sufficient warrant of the Constitution itself, which gave the United States the power to regulate commerce between all the States. There is no mistaking the Constitution's plain words. The power to regulate means sufficient power to effectually regulate, for, as said by Chief Justice Marshall in McCulloch v. Maryland, 17 U. S., 411: "The Constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the Government to general reasoning. To its enumeration of powers is added that of making 'all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department thereof.'" Now, it would seem idle for practical men to discuss the question whether regulation of the carrier to ensure performance of its duty is not vital to the regulation of commerce. In the very nature of things the right of the people of one State to market their products in another, and the corresponding right of the people of the latter to enjoy the products of the former, can not be

mutually enjoyed unless there be some regulating power over the carrier who performs the interstate service. Seeing, as said by Mr. Justice Peckham in United States v. Joint Traffic Association, supra, "the business of a railroad carrier is of a public nature and in performing it the carrier is also performing to a certain extent a function of government, which requires them to perform the service upon equal terms to all," by whom shall the requirement be made unless by Congress, and on whom except upon the carrier? And clearly the general power to forbid a public carrier from doing what hinders its performance of a public duty could not before the Constitution be denied to a sovereign State, for "the States were unquestionably supreme," says Mr. Justice Johnson in Gibbons v. Ogden, supra, "and each possessed that power over commerce which is acknowledged to reside in every sovereign State." When, then, all the States and the people thereof granted to the United States the broad power to regulate commerce between the States, did the incident to such power, namely, control of the carriers of such commerce, cease to exist or did it pass to the nation as an incident to the general power? If the sale of a ship vests in the new owner the right to thereafter control engine and rudder without mention of such power in the bill of sale, there can be no doubt that the grant of the general power to regulate commerce carried with it the right to regulate the carriers thereof as agencies of commerce. It is no answer to this to say that sufficient power to regulate and control exists in Congress in forbidding rebates and enforcing uniform rates. To concede to Congress power to regulate carriers by such means is to concede it power to regulate by other means. For whether regulation is best exercised by punishing past or by removing incentives to future unfairness is a question that concerns the exercise but not the existence of the power. Power to regulate commerce was held in the safety appliance cases, Johnson v. Southern Pacific Company, 196 U. S., 1, to justify regulations for safety devices upon carriers' cars, and if the power to regulate cars is an incident to the general power to regulate commerce, the power to make the carriers themselves efficient agencies of commerce can not be gainsaid. Regulation of interstate carriers in the manner provided by this act invokes no new principle and subjects them to no other condition than that impliedly assumed by everyone who enters upon a public duty, viz, that so far as private right interferes therewith it must be foregone. The right to contract belongs to every citizen, but when a citizen becomes a member of Congress, all right to contract with his Government is by R. S., sec. 3739, denied him. The profession of law has been held a right of which one may not be deprived by legislation, but only by decree of court: Ex parte Garland, 71 U. S., 333, but when a lawyer becomes a federal judge, the law by R. S., sec. 713, forbids him the right to use his property and practice his profession. Such prohibitions are not restrictions of liberty or deprivations of property. They are the law's aids to public service. They make the public servant have an

eye single to the public duty, voluntarily assumed, and in forbidding legislators, judges, and public carriers alike to act in a dual capacity the law but throws around them the time-proved safeguard of faithful service, that "no man can serve two masters."

It remains to notice the objection that timber was excepted from the interdicted commodities. Reflection will show that, so far as the evils sought by this law to be cured are concerned, timber differed greatly from coal. Apart from the grants of timber lands to pioneer trancontinental roads along their rights of way, our attention has been called to no public carrier dealing in and transporting timber. Nature has prevented this. Forests make streams, and water, from its nearness, and timber, from its capacity to float, make water transportation timber's natural outlet. It is impossible, therefore, for any land carrier to become such a private carrier of its own timber as to affect its duty as a public carrier, and a railroad so quickly exhausts the forests tributary to it that it could not long remain a distinctive timber road.

Satisfied, then, of the three propositions, namely, first, that under the Constitution the power to regulate commerce between the States is vested in Congress; secondly, that such power includes the power to regulate carriers thereof, and, thirdly, that the divorce of the dual relation of public carrier and private transporter is a regulation of commerce, I hold this law is constitutional, and from the opinion of the majority to the contrary I record my dissent.

233 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA *vs.* LEHIGH VALLEY RAILROAD COMPANY.	April sessions, 1908. In Equity. No. 97.

Before DALLAS, C. J.

And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penn. No. 97. U. S. vs. Lehigh Valley Railroad Company. Decree dismising bill. Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

234 No. 97. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT.
vs.
LEHIGH VALLEY RAILROAD COMPANY, DEFENDANT.

Now comes the complainant, the United States of America, through Charles J. Bonaparte, Attorney-General of the United States, and makes and files, on behalf of said United States, its assignment of errors, upon which it will rely upon its appeal to the Supreme Court of the United States from the judgment and decree made and entered in this case by the Circuit Court of the United States for the Eastern District of Pennsylvania, on the sixth day of October, in the year nineteen hundred and eight, that is to say:

1. That the Circuit Court erred in dismissing the bill of complaint in this case;

2. That the Circuit Court erred in refusing the injunction prayed in this case;

3. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "Commodities clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States;

4. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "Commodities
235 clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States in so far as it affects the transportation of property owned, acquired, manufactured, mined, or produced by the defendant prior to the enactment of the said so-called "Commodities clause;"

5. That the Circuit Court erred in holding that the said so-called "Commodities clause" is not a regulation of interstate commerce within the true meaning of the third clause of the eighth section of article one of the Constitution of the United States;

6. That the Circuit Court erred in holding that the said so-called "Commodities clause," being the legislation above mentioned, deprives the defendant of its property in violation of the fifth amendment of the Constitution;

7. That the Circuit Court erred in holding that the said so-called "Commodities clause" constitutes a prohibition and not a regulation of interstate commerce and, as such, exceeds the constitutional powers of the Congress conferred by the third clause of the eighth section of article one of the Constitution of the United States;

8. That the Circuit Court erred in holding that the said so-called "Commodities clause," being the legislation above mentioned, is discriminative in its provisions, and, therefore, constitutionally invalid;

9. That the Circuit Court erred in holding that the said so-called "Commodities clause," being the legislation above mentioned, constitutes an attempt to deprive the defendant of the right to use and enjoy its private property, and, as such, is incompatible with free government and inconsistent with the constitutional prohibitions against taking private property for public use without just compensation and depriving any person of liberty or property without due process of law;

236 10. That the Circuit Court erred in sustaining the objections raised by the defendant's answer to the constitutional validity of the so-called "Commodities clause," the legislation above mentioned, and in not overruling each and all of the said objections.

Wherefore the said complainant and petitioner prays that the said judgment and decree of the Circuit Court of the United States for the Eastern District of Pennsylvania be reversed.

CHARLES J. BONAPARTE,
Attorney-General.

J. WHITAKER THOMPSON,
United States Attorney.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 97. April session, 1908. In Equity. United States of America vs. Lehigh Valley Railroad Company. Assignment of errors. Filed October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

237 No. 97. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
LEHIGH VALLEY RAILROAD COMPANY, DEFENDANT.

To the honorable, the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

The United States of America, through Charles J. Bonaparte, Attorney-General of the United States, feeling itself aggrieved by the judgment and decree entered in the above entitled case, on the sixth day of October, in the year nineteen hundred and eight, does hereby appeal from said judgment and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers

upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES J. BONAPARTE,
Attorney-General.

J. WHITAKER THOMPSON,
United States Attorney.

Dated, October sixth, 1908.

238 (Endorsed:) U. S. C. C., E. D. of Penna. No. 97. April session, 1908. In Equity. United States of America vs. Lehigh Valley Railroad Company. Petition for Appeal. The clerk will please file within petition for appeal, the assignment of errors herewith, and order of court allowing appeal when granted. Charles J. Bonaparte, Attorney-General, J. Whitaker Thompson, U. S. attorney. Filed, October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

239 No. 97. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
LEHIGH VALLEY RAILROAD COMPANY, DEFENDANT.

Before DALLAS, C. J.

It is hereby ordered, that the appeal in the above entitled case to the Supreme Court of the United States be, and is hereby, allowed as prayed.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penna. No. 97. April session, 1908. In Equity. United States of America *vs.* Lehigh Valley Railroad Company. Order of court allowing appeal. Filed, October 6th, 1908. Henry B. Robb, clerk. By L., deputy clerk.

240 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to Lehigh Valley Railroad Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of within thirty days, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein United States of America is appellant and you are appellee, to show cause, if any there be, why the decree

rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable George M. Dallas, judge of the Circuit Court of the United States this sixth day of October, in the year of our Lord one thousand nine hundred and eight.

By the Court.

Attest:

Henry B. Robb, *Clerk.*

Service accepted,

John G. Johnson,

For J. W. Bayard,

Attorney for Appellee.

241 United States of America,

Eastern District of Pennsylvania, set:

I, Henry B. Robb, clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of United States of America v. Lehigh Valley Railroad Company, No. 97, April session, 1908, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this seventh day of October, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-third.

[seal.] Henry B. Robb,

Clerk of C. C.

(Indorsement on cover:) File No. 21366. E. Pennsylvania C. C. U. S. Term No. 570. The United States of America, appellant, vs. Lehigh Valley Railroad Company. Filed October 10th, 1908. File No. 21366.

Additional docket entries.

1908, Oct. 7. Record transmitted to U. S. Supreme Court.

1910, Feb. 22. Mandate received from U. S. Supreme Court ordering that the decree of this court be and the same is hereby reversed, &c., and filed.

1910, Feb. 25. Argued sur motion for settlement of decree.

1910, Mar. 7. Opinion sur motion of complainant to dismiss without prejudice filed. Decree reinstating cause filed. Decree denying motion to amend bill filed. Decree denying motion of complainant to dismiss bill of complaint without prejudice filed. Decree dismissing bill filed.

1910, Mar. 30. Order allowing amended bill of complaint to be filed nunc pro tunc as of March 7, 1910, filed. Amended bill of complaint filed nunc pro tunc as of March 7, 1910.

1910, Apr. 29. Assignments of error filed. Petition for appeal filed. Order allowing appeal filed. Citation allowed and issued. Citation returned "service accepted" and filed.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the Circuit Court of the United States for the eastern district of Pennsylvania, greeting:

Whereas, lately in the Circuit Court of the United States for the Eastern District of Pennsylvania, before you or some of you, in a cause between The United States of America, complainant, and Lehigh Valley Railroad Company, defendant, wherein the decree of the said Circuit Court, entered in said cause on the 6th day of October, A. D. 1908, is in the following words, viz: "And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed," as by the inspection of the transcript of the record of said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and eight, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings in conformity with the opinion of this court.

MAY 3, 1910.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of June, in the year of our Lord one thousand nine hundred and nine.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

(Endorsed:) 97. Ap. s., 1908. File No. 21366. Supreme Court of the United States. No. 570. October term, 1908. The United States of America vs. Lehigh Valley Railroad Company. Mandate. Filed Feb. 22, 1910. Henry B. Robb, clerk, by L., deputy clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA *v.* LEHIGH VALLEY RAILROAD COMPANY.	April sessions, 1908. In Equity, No. 97.

Before GRAY, BUFFINGTON, and LANNING, J. J.

Whereas in the above entitled cause the following decree was entered in this court on October 6, 1908; "And now, the sixth day of October, nineteen hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed;" and

Whereas the said decree was taken to the Supreme Court of the United States by an appeal; and

Whereas on the 3rd day of May, 1909, a decree was entered in said Supreme Court in the following words: "It is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed. And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings in conformity with the opinion of this court;" and

Whereas the mandate of that court issued on the 17th day of June, 1909, and has been called to the attention of this court;

Now, therefore, it is ordered that the decree of this court entered October 6, 1908, dismissing the bill herein, be set aside, and the cause be reinstated upon the docket of this court.

Dated, March 7, 1910.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Endorsed:) No. 97. Apr. sess., 1908. In the Circuit Court of the United States, Eastern District of Pennsylvania. In equity. United States of America v. Lehigh Valley Railroad Company. Decree reinstating cause. Filed Mar. 7, 1910. Henry B. Robb, clerk, by L., deputy clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA *v.* LEHIGH VALLEY RAILROAD COMPANY.	April sessions, 1908. In Equity, No. 97.

Before GRAY, BUFFINGTON, and LANNING, J. J.

Whereas in the above-entitled cause the following decree was entered in this court on October 6, 1908; "And now, the sixth day of October, nineteen hundred and eight, the above cause having come on

to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed;" and

Whereas the said decree was taken to the Supreme Court of the United States by an appeal; and

Whereas on the 3rd day of May, 1909, a decree was entered in said Supreme Court in the following words: "It is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed. And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings in conformity with the opinion of this court;" and

Whereas the mandate of that court issued on the 17th day of June, 1909, and has been called to the attention of this court; and

Whereas on this 25th day of February, 1910, complainant moved this court that the decree of this court entered herein October 6, 1908, dismissing the bill herein be set aside, and the cause be reinstated upon the docket of this court, and said motion was granted; and

Whereas complainant further moved the court for leave to file an amended bill of complaint herein and the said amended bill of complaint having been presented to the court and counsel for both sides having been heard by the court, Edwin P. Grosvenor in behalf of, and John G. Johnson against said motion:

Now, therefore, it is ordered that the said motion to amend be denied.

Dated, March 7, 1910.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penna. No. 97. April session, 1908. In equity. United States of America vs. Lehigh Valley Railroad Company. Decree denying motion to amend bill. Filed Mar. 7, 1910. Henry B. Robb, clerk, by L., deputy clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *vs.* LEHIGH VALLEY RAILROAD COMPANY, Defendant.	April sessions, 1908. In Equity, No. 97.

Amended bill of complaint.

(Filed March 30, 1910. Henry B. Robb, clerk; by L., deputy clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *v.* LEHIGH VALLEY RAILROAD COMPANY, Defendant.	April sessions, 1908. In Equity, No. 97.

Amended bill of complaint.

To the honorable the judges of said court:

The United States of America, by George W. Wickersham, its Attorney-General, brings this, its amended bill of complaint, against the Lehigh Valley Railroad Company, a railroad company hereinafter more particularly described. And therefore your orator complains and says:

(1) That the said "Lehigh Valley Railroad Company," hereinafter called "the defendant," is a corporation created, organized, and existing under the laws of the State of Pennsylvania, having its principal office in the State of Pennsylvania, at the city of Philadelphia, and has been such corporation since long before the 1st day of May, in the year nineteen hundred and eight.

(2) That the defendant is, and has been during its corporate existence, a railroad company now, and for some time past, operating, with its branches and connections, a railroad whose lines extend through parts of the States of Pennsylvania, New Jersey, New York, and other States. That it is, and has been since long before the said first day of May, in the year 1908, a common carrier within the meaning of an act of the Congress of the United States, approved February 4, 1887, entitled "An act to regulate commerce," and of all acts supplementary thereto or amendatory thereof; and that, as such common carrier, it is, and has been through all the period aforesaid, engaged in interstate transportation, particularly in the transportation, in interstate commerce, of the article or commodity known as "anthracite coal" from the mines and the mining lands in the State of Pennsylvania to the markets of other States.

(3) That as such common carrier, the defendant has been and now is engaged in interstate transportation of anthracite coal from the mines in the State of Pennsylvania to the markets of other States, in

violation of the act of Congress approved June 29, 1906, and more particularly the fifth paragraph of the first section of said act; and that the defendant, unless restrained by this court, will continue to violate said statute. This violation is being and will continue to be accomplished in the following manner:

The defendant continuously for several years last past has been and now is the owner of the entire capital stock of the Lehigh Valley Coal Company, hereinafter called "the Coal Company," a corporation of the State of Pennsylvania, which holds by conveyances and leases anthracite coal lands and coal mines situated in the counties of Carbon, Lehigh, Luzerne, and Wyoming, in the State of Pennsylvania, which mines have been and are being operated in the mining of coal, and are tributary to the lines of transportation operated by the defendant, and the coal so mined has been and is being carried by defendant over its said lines of transportation. There have been and are a large number of other companies and individuals situated in the same localities and engaged in the mining of such anthracite coal and in shipping the same over the lines of transportation owned by the defendant to markets in other States in competition with each other and the Coal Company.

The Coal Company is so organized and controlled by the defendant, and its affairs are so conducted as to make it merely an instrumentality or adjunct of the defendant. That the Coal Company is a mere adjunct, instrumentality, or department of the defendant appears from the following facts, among others:

For a long time past the defendant has owned and now owns the entire capital stock of the Coal Company.

For a long time past the officers of the defendant have been and are now the principal officers of the Coal Company. They are appointed officers of the Coal Company through the influence of the defendant, and for the reason that they are, respectively, officers of the defendant; as officers of the Coal Company they are acting merely on behalf of and for the defendant, and under the direction and instructions of the latter.

Specifying the officers more particularly:

The president of the defendant, E. B. Thomas, is president of the Coal Company; the first vice-president of the defendant, J. A. Middleton, is second vice-president of the Coal Company; the assistant to the president of the defendant, L. D. Smith, is assistant to the president of the Coal Company; the secretary of the defendant, D. G. Baird, is secretary of the Coal Company; the treasurer of the defendant, W. C. Alderson, is treasurer of the Coal Company; the assistant treasurer of the defendant, J. M. Baxter, is assistant treasurer of the Coal Company; the assistant secretary of the defendant, E. A. Albright, is assistant secretary of the Coal Company; the assistant treasurer of the defendant, J. William Robbins, is assistant secretary of the Coal Company.

Of the six directors of the Coal Company the following, to wit, George F. Baker and E. T. Stotesbury, are directors of the defendant,

and J. A. Middleton and L. D. Smith are, respectively, first vice-president and assistant to the president of defendant.

E. B. Thomas, E. T. Stotesbury, and George F. Baker, who are on the executive committee of the Coal Company, are also on the executive committee of the defendant.

The defendant, by reason of the fact that it owns the entire capital stock of the Coal Company, is enabled to and does dictate who shall be elected directors of the Coal Company, who shall be its officers and employees, and who shall be on the various committees.

Each of the above-named officers, directors, and committeemen, and others not specified, is appointed to his position in the Coal Company by reason of his holding a position with the defendant, thereby enabling him in all matters to act in the interests and on behalf of the defendant, and in the position in the Coal Company to which he has been appointed he acts in reality for and on behalf of the defendant and under the directions of the latter.

The Coal Company uses the offices of the defendant, and the work of the Coal Company is carried on over the office desks belonging to the defendant. The Coal Company in fact is nothing more than a department of the defendant, being operated by officers who in their principal capacity are officers of the defendant and by virtue of their position in the defendant, control and dominate the actions of the Coal Company.

The defendant, through its officers and directors, exercises a supervision over the coal mined by the Coal Company from the time of the mining of said coal to the sale of the same at New York and other markets. The defendant, through its officers and directors, determines how much coal the Coal Company shall mine, it dictates the shipment and transportation of said coal over its own lines, and it fixes, regulates, and determines the price at which the Coal Company shall sell the coal at the Atlantic seaboard and other places to which it has been transported over the lines of the defendant or at the dictation of the defendant.

Acting under the direction and instructions of the defendant, and of its officers and directors, the Coal Company has entered and is entering into contracts with other companies and individuals, producers and miners of coal, and tributary to the lines of transportation owned by defendant and to other railroads, for the purchase of the coal mined by said companies and individuals. The defendant causes this coal to be shipped and transported over its own lines, and, acting through the Coal Company, it fixes and determines the price at which such coal shall be sold after transportation to the Atlantic seaboard and other markets. The Coal Company as a rule loses money on these transactions, as the amounts received by it for the coal which it has bought from such companies and individuals generally do not equal the price paid by it for the coal plus the cost of transportation to market. The purpose of the defendant in compelling the Coal Company to enter into such contracts with other coal companies and individuals is thereby to remove the competition

which would otherwise exist between the coal mined and sold by such companies and the coal controlled by the defendant through the Coal Company, and, furthermore, to enable the defendant by means of these contracts to dictate the transportation of such coal over its own lines, and to obtain the freight charged therefor.

The Coal Company has not paid any dividends upon its stock during the time such stock has been owned by the defendant. It has been furnished millions of dollars by the defendant, which it has never refunded, and upon which during many years it paid no interest. The defendant has guaranteed bonds of the Coal Company and paid interest on such bonds. The earnings of the defendant received for the transportation over its lines of the coal produced by the Coal Company and of the coal controlled by means of the contracts above described compensates the defendant for the failure of the Coal Company to pay dividends on its stock.

The operation of the Coal Company by the defendant in effect merely is a device for evading the law, and more particularly the provisions of the said commodities clause. The Coal Company is not a bona fide mining company, but is merely an adjunct or instrumentality of the defendant. The defendant is in legal effect the owner of and has a pecuniary interest in the coal mined by the Coal Company, and which is transported by the defendant.

That by virtue of the facts hereinbefore set out and otherwise, and more particularly by virtue of the control, direction, domination, and supervision exercised by the persons who are the officers of the defendant railroad and by the defendant over all the operations of said Coal Company, embracing the mining and production of said coal, the shipment and transportation of the same over the defendant railroad, and the sale thereof at the seaboard, it follows:

First. That the Coal Company, not being in substance and in good faith a bona fide corporation, separate from the defendant, but a mere adjunct or instrumentality of the defendant, the defendant, at the time of transportation, has an interest, direct or indirect, in a legal or equitable sense, in said coal.

Second. That said coal of said Coal Company is mined and produced under the authority of defendant, and the defendant at the time of transportation and before the act of transportation has not in good faith dissociated itself from all exercise of authority over said coal, but continues to exercise authority over said coal at the time of transportation and over the subsequent sale thereof.

Therefore the transportation of said coal by the defendant in the manner and under the circumstances hereinabove described constitutes a violation of the fifth paragraph of the first section of said "act to regulate commerce," as amended by an act of Congress approved June 29, 1906.

(4) That from time to time since the 1st day of May, in the year 1908, and at the present time, of the anthracite coal so mined and being mined, as aforesaid, there has been, and there is being, loaded at or near the mines and lands from which said coal has been and is

being mined, as aforesaid, and within the counties aforesaid, upon the cars of the defendant, for transportation in interstate commerce, a large quantity, the number of tons being to your orator unknown; that such large quantity of coal, when so loaded as aforesaid, has been, and is being, carried and transported in the cars aforesaid over and upon the said railroad and its branches and connections of the defendant and through the State of Pennsylvania, within the jurisdiction of this court, and from Pennsylvania, by continuous carriage, in interstate commerce across the boundary line of the said State into the States of New York, New Jersey, and other States for sale and delivery at the markets of the said States of New Jersey, New York, and other States; and that such large quantity of anthracite coal, so transported as aforesaid, was not, and is not, necessary and intended for the use of the defendant in the conduct of its business as a common carrier.

(5) That the transportation of the anthracite coal by the defendant under the circumstances hereinabove described in paragraph 3 was, has been, and is unlawful, and a violation of the fifth paragraph of the first section of the said act to regulate commerce, as said section was amended by the act of the Congress of the United States approved June 29, 1906, which prescribes:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber, and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

(6) That it is the purpose of the defendant to continue the same unlawful transportation of said coal, so to be mined and loaded upon the cars of the defendant as aforesaid, as has been hereinbefore described, in violation of the law hereinbefore quoted.

(7) And so your orator says that the anthracite coal so as aforesaid being unlawfully transported by the defendant in interstate commerce, and the anthracite coal which it is the purpose of the defendant to continue to so unlawfully transport as aforesaid, in violation of the law hereinbefore quoted, is, and will be, "an article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority," and also, such "article or commodity," owned by it "in whole or in part," and is, likewise, "an article or commodity, other than timber and the manufactured products thereof," in which it has, and will have, an "interest direct or indirect;" and is not "an article or commodity necessary and intended," or which will be necessary and intended, "for its use in the conduct of its business as a common carrier."

To the end, therefore, that your orator may have that relief which it can only obtain in a court of equity; that the said defendant,

Lehigh Valley Railroad Company," may make full answer under
ath to all the allegations herein; and that an injunction be granted
o enjoin and prohibit the said "Lehigh Valley Railroad Company"
rom further transporting, in interstate commerce, the anthracite coal
hich it is the purpose of the said defendant to transport, as herein-
efore stated, in violation of the law hereinbefore quoted; and that
our orator may have such further or other relief in the premises as
he nature and circumstances of the case may require.

May it please your honors to grant to your orators a writ of sub-
œna, to be directed to the said "Lehigh Valley Railroad Company,"
hereby commanding it at a certain time therein to be limited, per-
onally to appear before this honorable court and then and there full,
rue, direct, and perfect answer make to all and singular the prem-
es, and to perform and abide by such order, direction, and decree as
ay be made against it in the premises, and as shall seem meet and
greeable to equity.

And your orator will ever pray.

GEORGE W. WICKERSHAM,
Attorney-General.
WADE H. ELLIS,
Assistant to the Attorney-General.
EDWIN P. GROSVENOR,
Special Assistant to the Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

Before BUFFINGTON and LANNING, J. J.

And now this 30th day of March, 1910, it is ordered that the
ithin amended bill be filed nunc protunc as of March 7, 1910.

BY THE COURT.

Attest:

GEORGE BRODBECK, *Dep. Clerk.*

n the Circuit Court of the United States for the Eastern District of
Pennsylvania.

UNITED STATES OF AMERICA *v.* EHIGH VALLEY RAILROAD COMPANY.	April sessions, 1908. In Equity, No. 97.

efore GRAY, BUFFINGTON, and LANNING, J. J.

Whereas in the above entitled cause the following decree was
tered in this court on October 6, 1908: "And now, the sixth day of
ctober, nineteen hundred and eight, the above cause having come on
be heard upon bill and answer, it is ordered and decreed that the
ll be dismissed;" and

Whereas the said decree was taken to the Supreme Court of the
nited States by an appeal; and

Whereas on the 3rd day of May, 1909, a decree was entered in said Supreme Court in the following words: "It is now here ordered, adjudged and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed. And it is further ordered that this cause be, and the same is hereby, remanded, to the said Circuit Court for further proceedings in conformity with the opinion of this court;" and

Whereas the mandate of that court issued on the 17th day of June, 1909, and has been called to the attention of this court; and

Whereas on this 25th day of February, 1910, complainant moved this court that the decree of this court entered herein October 6, 1908, dismissing the bill herein be set aside and the cause be reinstated upon the docket of this court, and said motion was granted, and complainant further moved that leave be given to file an amendment bill of complaint herein; and

Whereas said motion to amend was denied, and

Whereas said complainant then moved for a decree dismissing said bill of complaint without prejudice, and said motion was duly argued by counsel for the complainant and the defendant, and duly considered, by the court:

It is now, on this 7th day of March, 1910, ordered that said motion to dismiss without prejudice be and the same is hereby denied.

Dated March 7, 1910.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penna. No. 97. April session, 1908. In equity. United States of America vs. Lehigh Valley Railroad Company. Decree denying motion of complainant to dismiss bill of complaint without prejudice. Filed Mar. 7, 1910. Henry B. Robb, clerk, by L., deputy clerk.

In the United States Circuit Court for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA *vs.* LEHIGH VALLEY RAILROAD COMPANY.	In Equity. April session, 1908. No. 97.

Motion of Government to dismiss without prejudice.

In considering this motion it must be remembered that the decree of the Supreme Court in the matter of the appeal from the decree of this court in the present case is in these words: "It is now here ordered and adjudged that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed. And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings in conformity with the opinion of this court." As we read that opinion the Supreme Court

has decided on the facts set forth in the bills and answers of the several cases before it that the holding by one of the defendant companies of the entire stock of a bona fide corporation, and the control thereby resulting to it from its power, and the exercise thereof, to appoint its directors and manage its business, does not give such railroad company any interest, direct or indirect, in the coal which may be mined by such corporation and transported in interstate commerce over the lines of such railroad company within the meaning of these words as contained in the act under review.

In the bill of complaint filed in this cause it is alleged:

"That the defendant (the Lehigh Valley Railroad Co.) is, and has been continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of the entire capital stock of the Lehigh Valley Coal Company and of Coxe Brothers & Co., Incorporated, corporations of the said State of Pennsylvania, and that it thus controls and has been controlling, the election of the directors or managers of said coal companies. That said coal companies hold, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Carbon, Lehigh, Luzerne, and Wyoming, in the said State of Pennsylvania; but said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the direct management of the respective presidents and directors of said coal companies, the president of each of said coal companies being, as he has been for a long time past, the president of the defendant, and a majority of the directors of each of said coal companies being officers or directors of the defendant, as they have been for a long time past. That by virtue of the ownership of the entire capital stock of said coal companies by the defendant, as hereinbefore stated, the defendant owns said coal lands and coal mines, and the anthracite coal therein or thereupon and mined, and being mined, therefrom . . . . and that by virtue of the management of said coal companies by certain of the officers of the defendant, as hereinbefore stated, the operations of said coal companies in the mining of anthracite coal, have been, and are now being, carried on by and under the authority of the defendant."

The defendant, while denying the legal conclusion from the material facts thus alleged by the bill of complaint ". . . admits that it is now and has been for many years past the owner of shares of the capital stock of the coal companies named in the bill of complaint, and alleges in regard thereto as follows: This defendant now owns the entire capital stock of the Lehigh Valley Coal Company."

With these averments of the bill and answer before it, and the cause having been heard on the pleadings, the Supreme Court in its opinion said:

"It remains to determine the nature and character of the interest embraced in the words 'in which it is interested directly or indirectly.'

The contention of the Government that the clause forbids a railroad company to transport any commodity manufactured, mined, or produced, or owned in whole or in part, etc., by a bona fide corporation in which the transporting carrier holds a stock interest, however small, is based upon the assumption that such prohibition is embraced in the words we are considering. The opposing contention, however, is that interest, direct or indirect, includes only commodities in which a carrier has a legal interest, and therefore does not exclude the right to carry commodities which have been manufactured, mined, produced, or owned by a separate and distinct corporation, simply because the transporting carrier may be interested in the producing, etc., corporation as an owner of stock therein. If the words in question are to be taken as embracing only a legal or equitable interest in the commodities to which they refer they can not be held to include commodities manufactured, mined, produced, or owned, etc., by a distinct corporation merely because of a stock ownership of the carrier. Pullman Palace Car Co. v. Missouri Pacific R. R., 115 U. S., 587; Conley v. Mathieson Alkali Works, 190 U. S., 406. And that this is well settled also in the law of Pennsylvania is not questioned. It is unnecessary to pursue the subject in more detail, since it is conceded in the argument for the Government that if the clause embraces only a legal interest in an article or commodity it can not be held to include a prohibition against carrying a commodity simply because it had been manufactured, mined, or produced, or is owned by a corporation in which the carrier is a stockholder. The contention of the Government substantially rests upon the assumption that unless the words be given the meaning contended for they are without significance. That this is clearly not the case is well illustrated by the New Haven case, supra. In that case the Chesapeake & Ohio Railway Company, it was shown at one time, not only directly engaged in buying, selling, and transporting coal, but subsequently, when a statute was passed in West Virginia prohibiting such dealings, it resorted to indirect methods for the continuance of its previous practice. It may well be that the very object of the provision was to reach and render impossible the successful employment of methods of the character referred to. Certain it is, however, that in the legislative progress of the clause in the Senate, where the clause originated, an amendment in specific terms, causing the clause to embrace stock ownership, was rejected, and immediately upon such rejection an amendment, expressly declaring that interest, direct or indirect, was intended, among other things, to embrace the prohibition of carrying a commodity manufactured, mined, produced, or owned by a corporation in which a railroad company was interested as a stockholder, was also rejected. (1906, Cong. Rec., pt. 7, pp. 7012–7014.) And the considerations just stated we think completely dispose of the contention that stock ownership must have been in the mind of Congress, and therefore must be treated as though embraced within the evil intended to be remedied, since it can not in reason be assumed that there is a duty to extend the meaning of a statute be-

yond its legal sense upon the theory that a provision which was expressly excluded was intended to be included. If it be that the mind of Congress was fixed on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it. At all events, in view of the far-reaching consequences of giving the statute such a construction as that contended for, as indicated by the statement taken from the answers and returns which we have previously inserted in the margin, and of the questions of constitutional power which would arise if that construction was adopted, we hold the contention of the Government not well founded.

We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: . . . . When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced, or owned, etc., by a bona fide corporation in which the railroad company is a stockholder."

The counsel for the complainant, after the reinstatement of the cause, applied to this court for leave to amend the bill of complaint. The court thought the application should be denied, and accordingly did deny it; thereupon the counsel for the Government moved to dismiss the bill of complaint without prejudice, which motion was opposed by counsel for the defendant. The court having declined to grant this motion, the counsel for the defendant thereupon moved to dismiss the bill absolutely. The court then inquired of counsel for the Government whether, in view of the premises, he desired to have the cause stand for further proceedings in this court, and upon his statement that the Government would not proceed any further in this court in view of the fact that the amendment had been disallowed, our conclusion is that the bill should be dismissed absolutely upon the allegations of the bill and answer. It will be observed that this case differs from United States vs. Delaware, Lackawanna & Western Railroad Company, in which upon its reinstatement, an injunction was ordered to be issued.

(Endorsed:) 97. Apr. sess., 1908. United States of America vs. Lehigh Valley Railroad Company. Opinion on motion of complainant to dismiss without prejudice. Filed Mar. 7, 1910. Henry B. Robb, clerk, by L., deputy clerk.

41704—10——6

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA *v.* LEHIGH VALLEY RAILROAD COMPANY.	April sessions, 1908. In equity, No. 97.

Before GRAY, BUFFINGTON, and LANNING, J. J.

Whereas in the above-entitled cause the following decree was entered in this court on October 6, 1908: "And now, the sixth day of October, nineteen hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed;" and

Whereas the said decree was taken to the Supreme Court of the United States by an appeal; and

Whereas on the 3rd day of May, 1909, a decree was entered in said Supreme Court in the following words: "It is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed. And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings in conformity with the opinion of this court;" and

Whereas the mandate of that court issued on the 17th day of June, 1909, and has been called to the attention of this court; and

Whereas, referring to the said opinion of the Supreme Court of the United States and in conformity thereto, it appears upon the pleadings in this cause that the defendant Lehigh Valley Railroad Company is not transporting in interstate commerce from any State, Territory, or the District of Columbia to any State, Territory, or the District of Columbia, or to any foreign country, any coal which has been mined, manufactured, or produced by it, and which it owned in whole or in part at the time of transportation, except such coal as was necessary and intended for its use in the conduct of its business as a common carrier;

And whereas the Attorney-General of the United States has moved for the entry of a decree dismissing the bill without prejudice, and said motion has been opposed by the defendant, and the court has denied the motion;

And whereas the Attorney-General has declared, his motion to dismiss without prejudice having been denied, that he intends to proceed no further in this court in this cause:

It is therefore, on motion of counsel for the defendant, ordered and decreed that the bill be, and the same is hereby, dismissed.

Dated, March 7, 1910.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Endorsed:) No. 97. Apr. sess., 1908. In the Circuit Court of the United States, Eastern District of Pennsylvania. In equity. United States of America v. Lehigh Valley Railroad Company. Decree dismissing bill. Filed Mar. 7, 1910. Henry B. Robb, by L., deputy clerk.

Equity, No. 97.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Lehigh Valley Railroad Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the city of Washington, D. C., within thirty days, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States for the Eastern District of Pennsylvania, wherein United States of America is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. M. Lanning, judge of the Circuit Court of the United States for the Eastern District of Pennsylvania, this 29th day of April, in the year of our Lord nineteen hundred and ten (1910).

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

Service accepted.

JOHN G. JOHNSON, *Attorney for Appellee.*

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *vs.* LEHIGH VALLEY RAILROAD COMPANY, defendant	In Equity. April sessions, 1908. No. 97.

To the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania.

The United States of America, through William S. Kenyon, assistant to the Attorney-General of the United States, feeling itself aggrieved by the judgment and decree entered in the above-entitled cause on the seventh day of March, in the year nineteen hundred and ten, does hereby appeal from said judgment and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceed-

ings, and papers upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

April 29, 1910.

WILLIAM S. KENYON,
Assistant to the Attorney-General.
EDWIN P. GROSVENOR,
Special Assistant to the Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, complainant, *vs.* LEHIGH VALLEY RAILROAD COMPANY, defendant.	In Equity. April sessions, 1908. No. 97.

Before LANNING, C. J.

It is hereby ordered that the appeal in the above entitled case to the Supreme Court of the United States be and is hereby allowed as prayed.

W. M. LANNING, *Circuit Judge.*
BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA, petitioner, *vs.* LEHIGH VALLEY RAILROAD COMPANY, defendant.	In Equity. April sessions, 1908. No. 97.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

Comes now The United States of America, by counsel, and in connection with its petition for appeal to the Supreme Court of the United States from the decree of the Circuit Court of the United States for the Eastern District of Pennsylvania entered herein on the seventh day of March, 1910, dismissing absolutely the bill of complaint herein, makes and files the following assignment of errors.

I.

The complainant having filed a bill of complaint praying an injunction under the fifth paragraph of the first section of the act to regulate commerce as amended by the act approved June 29, 1906, commonly called the "Commodities clause," in which bill it was stated in effect that the Lehigh Valley Railroad Company was transporting certain coal in violation of the commodities clause, and such proceedings having been had in said Circuit Court, that said bill was dismissed by the Circuit Court on the ground that said paragraph of said act of Congress was unconstitutional and void, and complainant having prosecuted an appeal to the United States Supreme Court and that court having construed said section and having held it to be constitutional as so construed, and having remanded the cause to the court below for further proceedings in conformity with the opinion of the Supreme Court, and the complainant on the filing of the mandate in the court below, and on the reinstatement of the cause in that court having moved the court for permission to file an amended bill of complaint in the cause, which amended bill was for the purpose of supplying certain allegations of fact in the record from which it would appear that the railroad had a legal or equitable interest in the coal, the original bill having shown only a stock interest by the railroad in the Lehigh Valley Coal Company, the said Circuit Court erred in not granting said motion and in refusing leave to the complainant to file the amended bill of complaint.

II.

The complainant having filed a bill of complaint praying an injunction under the fifth paragraph of the first section of the act to regulate commerce as amended by the act approved June 29, 1906, commonly called the "Commodities clause," in which bill it was stated in effect that the Lehigh Valley Railroad Company was transporting certain coal in violation of the commodities clause, and such proceedings having been had in said Circuit Court, that said bill was dismissed by the Circuit Court on the ground that said act of Congress was unconstitutional and void, and complainant having prosecuted an appeal to the Supreme Court and that court having construed said act and having held it to be constitutional as so construed, and having remanded the cause to the court below for further proceedings in conformity with the opinion of the Supreme Court, and the complainant on the filing of the mandate in the court below, and on the reinstatement of the cause in that court having moved the court for permission to file an amended bill of complaint, which amended bill of complaint was for the purpose of supplying certain allegations of fact in the record from which it would appear that the railroad had a legal or equitable interest in the coal, the original bill having shown only a stock interest by the railroad in the Lehigh Valley Coal Company, and the court having denied said motion and

the complainant having then moved that the court dismiss the complaint without prejudice, the Circuit Court erred in denying said motion to dismiss without prejudice.

III.

The complainant having filed a bill of complaint praying an injunction under the fifth paragraph of the first section of the act to regulate commerce as amended by the act approved June 29, 1906, commonly called the "Commodities clause," in which bill it was stated in effect that the Lehigh Valley Railroad Company was transporting certain coal in violation of the commodities clause, and such proceedings having been had in said Circuit Court, that said bill was dismissed by the Circuit Court on the ground that said act of Congress was unconstitutional and void, and complainant having prosecuted an appeal to the United States Supreme Court and that court having construed said act and having held it to be constitutional as so construed, and having remanded the cause to the court below for further proceedings in conformity with the opinion of the Supreme Court, and the complainant on the filing of the mandate in the court below, and on the reinstatement of the cause in that court having moved the court for permission to file an amended bill of complaint in the cause, which amended bill was for the purpose of supplying certain allegations of fact in the record from which it would appear that the railroad had a legal or equitable interest in the coal, the original bill having shown only a stock interest by the railroad in the Lehigh Valley Coal Company, and the court having denied said motion and the complainant having further moved that the court dismiss the complaint without prejudice, and the court having denied said motion to dismiss without prejudice and the defendant then having moved the court to dismiss the bill of complaint absolutely, said Circuit Court erred in dismissing said bill of complaint absolutely.

IV.

The Circuit Court erred in denying the motion for leave to file said amended bill of complaint, for that the denial of said motion made it impossible for the complainant to supply in the record certain allegations of fact which, if pleaded, would have brought the statement of the facts making out the cause of action of the complainant within the construction placed upon the commodities clause by the Supreme Court in its opinion on said appeal, and which facts, if pleaded and proven, would have entitled the complainant to a decree against said defendant, the said new allegations of fact not stating a new cause of action, but merely supplying in the record certain allegations of fact showing that the carriage of the coal by the defendant is unlawful, said coal being ostensibly owned by the Lehigh Valley Coal Company but in fact owned by the defendant,

legally or equitably, and said new allegations of fact not having been stated in the original complaint for the reason that said act not having been construed by the Supreme Court, it was considered that an ownership of stock by the railroad in the coal company made the carriage by the railroad of the coal of the coal company unlawful, whereas the purpose of said additional allegations was to show that the coal company is in fact but a department of the railroad, and that while the coal is ostensibly owned by the coal company, it is in reality owned by the railroad, legally or equitably, and that therefore the coal company is not a bona fide company within the meaning of that term as used in the opinion of the Supreme Court, and therefore the carriage of the coal by the defendant under the circumstances described in said proposed additional allegations is unlawful.

V.

The Circuit Court erred in denying the motion of complainant to dismiss without prejudice, for after the Circuit Court had denied leave to amend the bill of complaint, the denial of the motion to dismiss without prejudice made it impossible for the complainant to bring a new complaint in another action for the same cause of action, said cause of action being the unlawful carrying by the defendant of the coal ostensibly owned by the Lehigh Valley Coal Company, but in reality owned legally or equitably by the defendant: as the original complaint did not sufficiently set forth the facts upon which the cause of action is based, and the Circuit Court allowed the complainant neither to amend nor to dismiss without prejudice, it will be impossible for complainant to obtain any relief in the premises.

VI.

The Circuit Court erred in dismissing absolutely the bill of complaint herein, for since the Circuit Court had denied the motion of complainant to amend, and had further denied the motion to dismiss without prejudice, said absolute dismissal operates as a bar to the institution on the part of complainant of any new suit for the same cause of action, and accordingly prevents the complainant from obtaining a decree enjoining the carriage by the defendant of the coal ostensibly owned by the Lehigh Valley Coal Company, but which is in reality either legally or equitably owned by the defendant, said Lehigh Valley Coal Company being nothing more than a department or bureau of the railroad company and not a bona fide company within the meaning of that term as used in the opinion of the Supreme Court.

VII.

The Circuit Court erred in holding that it had been decided by the Supreme Court on said appeal that the Lehigh Valley Coal Company

is a bona fide coal company within the meaning of that term as used in the opinion of the Supreme Court, and that the carriage of the coal by the defendant is not prohibited by the commodities clause, and in dismissing the bill of complaint absolutely accordingly.

VIII.

The Circuit Court erred in holding that it had been decided by the Supreme Court on said appeal that the Lehigh Valley Coal Company is not a mere adjunct or instrumentality of the defendant and that the defendant has not at the time of transportation any interest, direct or indirect, in a legal or equitable sense, in the coal ostensibly owned by the Lehigh Valley Coal Company, and that the carriage of said coal by the defendant is not prohibited by the commodities clause, and in dismissing the bill of complaint absolutely accordingly.

IX.

The Circuit Court erred in holding that it had been decided by the Supreme Court on said appeal that said coal is not mined or produced under the authority of the defendant railroad, and that the defendant at the time of transportation and before the act of transportation has in good faith dissociated itself from all exercise of authority over said coal, and that the carriage of said coal by the defendant is not prohibited by the commodities clause, and in dismissing the bill of complaint absolutely accordingly.

X.

The Circuit Court erred in holding that it had been decided by the Supreme Court on said appeal that the operation of the Lehigh Valley Coal Company by the defendant, by virtue of the control, direction, domination and supervision exercised by the defendant over all the acts of said coal company, is not in effect merely a device for evading the law and more particularly the provisions of the said commodities clause, and that the carriage of said coal by the defendant is not prohibited by the commodities clause, and in dismissing the bill of complaint absolutely accordingly.

XI.

The Circuit Court erred in holding that it had been decided by the Supreme Court on said appeal that the carriage of said coal by the defendant under the circumstances set out in the proposed amended bill of complaint is not prohibited by the commodities clause and in dismissing the bill of complaint absolutely accordingly.

XII.

The Circuit Court erred in not permitting the complainant to file an amended bill of complaint, and thereby to present for the consideration of the court the question of whether or not the Lehigh Valley Coal Company is a bona fide coal company within the meaning of that term as used in the opinion of the Supreme Court and whether or not the carriage of the coal of said company by the defendant is prohibited by the commodities clause.

XIII.

After the Circuit Court had denied the motion to amend, said court further erred in denying the motion of complainant to dismiss without prejudice, for that said denial of said motion prevented the complainant from bringing a new bill of complaint in another action, and thereby presenting for the consideration of the court the question of whether or not the carriage by the defendant of the coal ostensibly owned by the Lehigh Valley Coal Company is prohibited by said commodities clause.

XIV.

After the Circuit Court had denied the motion to amend and had further denied the motion of complainant to dismiss without prejudice, said court further erred in dismissing the bill of complaint, for that said dismissal prevents the complainant from bringing a new bill of complaint in another action, and thereby presenting for the consideration of the court the question of whether or not the carriage by the defendant of the coal ostensibly owned by the Lehigh Valley Coal Company is prohibited by said commodities clause.

By reason whereof, the United States prays that the said decree dismissing the bill of complaint absolutely herein be reversed.

April 29, 1910.

WILLIAM S. KENYON,
Assistant to the Attorney-General.
EDWIN P. GROSVENOR,
Special Assistant to the Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

Filed Apr. 29, 1910. Henry B. Robb, clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct.:

I, Henry B. Robb, clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful

copy of the original pleas and proceedings in the case of the United States of America against the Lehigh Valley Railroad Company, # 97, April session, 1908, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this twenty-ninth day of April, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States the one hundred and thirty-fourth.

[SEAL.] HENRY B. ROBB, *Clerk of C. C.*

(Indorsement on cover:) File No., 22145. E. Pennsylvania. C. C. U. S. Term No., 919. The United States of America, appellant, vs. Lehigh Valley Railroad Company. Filed May 7th, 1910. File No., 22145.

○

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted], 1910.

No. [redacted] 537

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

ERIE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED MAY 9, 1910

(22146)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 920.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

ERIE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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APRIL SESSION, 1908.

arles J. Bonaparte. United States of America
87 *vs.*
bert W. de Forest, Erie Railroad Company.
n G. Johnson.

908, June 5. Bill of complaint filed.
908, June 5. Subpœna issued returnable the first Monday of
y next.
908, June 5. Order for the appearance of Robert W. deForest
l John G. Johnson, esquires, for defendant.
908, June 12. Answer filed.
908, June 15. Printed copy of bill of complaint filed.
908, June 16. Stipulation of counsel filed.
908, June 16. Replication filed.
908, June 16. Argued.
908, June 17. Ordered that the defendants file brief by June 25,
8, and that complainant file reply brief by July 1, 1908.
908, September 10. Opinion dismissing bill in equity filed.
908, October 6. Dissenting opinion by Buffington, J., filed.
Decree dismissing bill of complaint filed.
Assignments of error filed.
Petition for appeal filed.
Order allowing appeal filed.
Citation allowed and issued.
Citation returned "service accepted" and filed.

No. 87. April sessions, 1908. In Equity.

the Circuit Court of the United States for the Eastern District of Pennsylvania.

ITED STATES OF AMERICA, COMPLAINANT,
vs.
RIE RAILROAD COMPANY, DEFENDANT.

Bill of Complaint.

iled June 5, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

TED STATES OF AMERICA, complainant, *vs.* RIE RAILROAD COMPANY, defendant. | April sessions, 1908. No. 87. In Equity.

the Honorable, the Judges of said Court:

he United States of America, by Charles J. Bonaparte, its Attor-General, brings this, its bill of complaint, against the Erie

Railroad Company, a railroad company hereinafter more particularly described. And therefore your orator complains and says:

(1) That the said "Erie Railroad Company," herein designated and called "the defendant," is a corporation created, organized, and existing under the laws of the State of New York, having its
5 principal office in the State of New York, at the city of New York, and also an office in the State of Pennsylvania, at the city of Susquehanna, and has been such corporation since long before the first day of May, in the year nineteen hundred and eight.

(2) That the defendant is, and has been during its corporate existence, a railroad company now, and for some time past, operating, with its branches and connections, a railroad whose lines extend through parts of the States of Pennsylvania, New Jersey, New York, and other States. That it is, and has been since long before the said first day of May, in the year nineteen hundred and eight, a common carrier within the meaning of an act of the Congress of the United States approved February 4, 1887, entitled "An act to regulate commerce," and of all acts supplementary thereto or amendatory thereof; and that, as such common carrier, it is, and has been through all the period aforesaid, engaged in interstate transportation, particularly in the transportation, in interstate commerce, of the article or commodity known as "anthracite coal" from the mines and the mining lands in the State of Pennsylvania to the markets of other States.

(3) That the defendant is, and has been continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of the entire capital stock of the Hillside Coal and Iron Company and of the Pennsylvania Coal Company, corporations of the said State of Pennsylvania, and that it thus controls, and
6 has been controlling, the election of the directors or managers of said coal companies. That said coal companies hold, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Lackawanna, Luzerne, and Susquehanna, in the State of Pennsylvania; but said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the direct management of the respective officers and directors of said coal companies, most of whom are, in the case of each of said coal companies, as they have been for some time past, either officers or directors of the defendant. That, by virtue of the ownership of the entire capital stock of said coal companies by the defendant, as hereinbefore stated, the defendant owns said coal lands and coal mines, and the anthracite coal therein or thereupon and mined, and being mined, therefrom, and has an interest therein; and that, by virtue of the management of said coal companies by certain of the officers of the defendant, as hereinbefore stated, the operations of said coal companies, in the mining of anthracite coal, have been, and are now being, carried on by and under the authority of the defendant.

(4) That, moreover, the defendant is, at the present time, and has been for a period since long before the said first day of May, in
7 the year nineteen hundred and eight, the owner of some part of the capital stock of the Temple Iron Company, a corporation of the said State of Pennsylvania, which holds, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Carbon, Lehigh, Luzerne, and Wyoming, in the said State of Pennsylvania, which said coal lands and coal mines are being operated, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, in the mining of anthracite coal, by and under the direct management of a board of directors, one of whom is president, as he has been for a long time past, of the defendant. That, by virtue of such stock ownership, the defendant owns in part, and has an interest in, said last-mentioned coal lands and coal mines and the anthracite coal therein or thereupon and mined, and being mined, therefrom; and that, by virtue of the management of said last-mentioned coal company by a board of directors one of whom is an officer of the defendant, as hereinbefore stated, the operations of said last-mentioned coal company, in the mining of anthracite coal, are being carried on, as they have been in the past, by and under the authority of the defendant, as well as by and under the authority of other persons or corporations.

(5) That from time to time since the first day of May, in
8 the year nineteen hundred and eight, and at the present time, of the anthracite coal so mined and being mined, as aforesaid, there has been, and there is being, loaded at, or near, the mines and lands from which said coal has been, and is being, mined as aforesaid, and within the counties aforesaid, upon the cars of the defendant, for transportation in interstate commerce, a large quantity, the number of tons whereof being to your orator unknown; that such large quantity of coal, when so loaded as aforesaid, has been, and is being, carried and transported in the cars aforesaid, over and upon the said railroad, and its branches and connections, of the defendant, and through and over territory of the said State of Pennsylvania within the jurisdiction of this court, and from the said State of Pennsylvania, by continuous carriage, in interstate commerce, across the boundary line of the said State of Pennsylvania to and into the States of New York, New Jersey, and other States for sale and delivery at the markets of the said States of New Jersey, New York, and other States; and that such large quantity of anthracite coal, so transported as aforesaid, was not, and is not, necessary and intended for the use of the defendant in the conduct of its business as a common carrier.

(6) That, the defendant being the owner and part owner of the anthracite coal mined and being mined and transported and being transported, as aforesaid, and such coal having been and being
9 mined by the defendant and under its authority, as aforesaid,

and the defendant having an interest in said coal, as aforesaid, the transportation of said coal, as aforesaid, was, has been, and is unlawful, being a failure to comply with and a violation of the fifth paragraph of the first section of said "Act to regulate commerce" as said section was amended by an act of the Congress of the United States, approved June 29, 1906, which prescribes:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity other than timber and the manufactured products thereof, manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

(7) That not only is said anthracite coal now being mined by and under the authority of the defendant and loaded on the cars of the defendant for transportation in interstate commerce, as hereinbefore set forth, but it will be so mined and loaded in the future; and that it is the purpose of the defendant to continue the same unlawful transportation of said coal, so to be mined and loaded upon the cars
10 of the defendant, as aforesaid, as has been hereinbefore described, in violation of the law hereinbefore quoted.

(8) And so your orator says that the anthracite coal so, as aforesaid, being unlawfully transported by the defendant in interstate commerce, and the anthracite coal which it is the purpose of the defendant to continue to so unlawfully transport, as aforesaid, in violation of the law hereinbefore quoted, is and will be "an article or commodity other than timber and the manufactured products thereof, manufactured, mined, or produced by it or under its authority," and also such "article or commodity" owned by it "in whole or in part," and is likewise "an article or commodity other than timber and the manufactured products thereof," in which it has and will have an "interest, direct or indirect," and is not "an article or commodity" "necessary and intended," or which will be necessary and intended, "for its use in the conduct of its business as a common carrier."

To the end, therefore, that your orator may have that relief which it can only obtain in a court of equity, that the said defendant, "Erie Railroad Company," may make full answer under oath to all the allegations herein, and that an injunction be granted to enjoin and prohibit the said "Erie Railroad Company" from further transporting in interstate commerce the anthracite coal which it is the purpose of said defendant to transport, as hereinbefore stated, in violation of the law hereinbefore quoted, and that your orator may have such
11 further or other relief in the premises as the nature and circumstances of the case may require.

May it please your honors to grant to your orator a writ of subpœna, to be directed to the said "Erie Railroad Company," thereby commanding it, at a certain time therein to be limited, personally to appear before this honorable court and then and there full, true, direct, and perfect answer make to all and singular the premises, and to perform and abide by such order, direction, and decree as may be made against it in the premises, and as shall seem meet and agreeable to equity.

And you orator will ever pray.

CHARLES J. BONAPARTE,
Attorney-General.

14 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
vs.
ERIE RAILROAD COMPANY.
} April session, 1908. No. 87.

Enter our appearance for defendant in the above case. June 5th, 1908.

ROBERT W. DE FORREST,
JOHN G. JOHNSON,
Per F. MARKO RIVINUS,
Attorneys for Defendant.

To CLERK OF SAID COURT.

(Endorsed:) U. S. C. C. C., E. D. of Penna. No. 87. 1908. U. S. of America v. Erie Railroad Company. Order for appearance. Filed June 5, 1908. Henry B. Robb, clerk. By L., deputy clerk. Robert W. de Forrest, John G. Johnson, attorneys for defendant.

15 87. Apr. Sess., 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ERIE RAILROAD COMPANY, DEFENDANT.
} In Equity.

Answer of Erie Railroad Company.

GEO. F. BROWNELL,
Solicitor and Counsel for Defendant.
ADELBERT MOOT, *Of Counsel.*

Filed June 12, 1908. Henry B. Robb, clerk. By L., deputy clerk.

17 United States Circuit Court, Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ERIE RAILROAD COMPANY, DEFENDANT. } In Equity, No.

The defendant, Erie Railroad Company, for answer to the bill of complaint herein, respectfully shows:

1. The defendant, Erie Railroad Company, admits and alleges that it is, and since long before the first day of May, 1908, and since long before the passage of the act of Congress, approved June 29, 1906, amending the interstate commerce act, has been, a corporation created, organized, and existing under the laws of the State of New York, and is, and during all such times has been, engaged in the operation of a railroad, with its lines, branches, and connections extend-
18 ing through parts of the States of New York, New Jersey, Pennsylvania, and other States, and engaged in interstate as well as intrastate transportation of passengers and property thereover, including the transportation of the article or commodity known as anthracite coal from mines and mining lands in the State of Pennsylvania to points and markets in other States. The defendant was duly organized under the provisions of the stock corporation law of the State of New York, providing for the reorganization of corporations whose property and franchises have been sold under mortgage foreclosure, with the right to hold and acquire the stocks and bonds of any other corporation, domestic or foreign, and duly succeeded to and lawfully acquired the railroads, stocks, and other property, rights, and franchises theretofore possessed by the New York, Lake Erie and Western Railroad Company, including those formerly possessed by the Erie Railroad Company or by the New York and Erie Railroad Company, the predecessors in interest of said New York, Lake Erie and Western Railroad Company. The New York and Erie Railroad Company was incorporated by a special act of the legislature of the State of New York, passed April 24, 1832, being chapter 224 of the laws of 1832, whereby said New York and Erie Railroad Company was duly authorized to build and operate a railroad to carry passengers and freight from some point in or near New
19 York City to Lake Erie. Thereafter by chapter 199 of the laws of 1846 and chapter 316 of the laws of 1847 of the laws of New York said corporation was given power to build a portion of its railroad in Pennsylvania, in so far as the State of New York could give it such power. To make such grant of power by the State of New York effective, the State of Pennsylvania, by an act of its general assembly entitled "An act to authorize the New York and Erie Railroad Company to construct said road through a portion of Susquehanna County, in the State of Pennsylvania," and acts supplementary thereto passed, respectively, March 26, 1846, and April 1, 1848, granted to the said New York and Erie Railroad Company the right to construct and operate said railroad in said State of Penn-

sylvania and various other powers and rights necessary or convenient for the construction and operation of such railroad, upon condition that it pay annually to the State of Pennsylvania $10,000 for such right or franchise so granted to it.

2. Said corporation, said New York and Erie Railroad Company, and its successors, at great expense, did construct and operate such railroad in the States of New York and Pennsylvania. The $10,000 so required to be paid the State of Pennsylvania for such franchise has been annually paid to the State of Pennsylvania to and including January, 1908, for the right to build and operate such railroad in said State of Pennsylvania. The country through which such
20 railroad was built in New York and Pennsylvania was mountainous, was thinly settled by pioneers, was largely covered with forests, and was greatly in need of railroad transportation, but it was then difficult to get the capital to build a railroad necessarily so expensive to build in so difficult a country, and there was not enough traffic then to make such a railroad pay its operating expenses and fixed charges. The returns from its business were poor, the debt necessarily incurred in building it was large, and said company, to provide the necessary capital therefor and for its corporate purposes, from time to time mortgaged all its property, rights, and franchises to secure the payment of its bonds issued thereunder, viz, first mortgage, dated May 14, 1845, to secure bonds of which $2,482,000 in amount are outstanding, maturing May 1, 1947; second mortgage, dated March 1, 1849, to secure bonds of which $2,149,000 in amount are outstanding, maturing September 1, 1919; third mortgage, dated March 1, 1853, to secure bonds of which $4,617,000 in amount are outstanding, maturing March 1, 1923; fourth mortgage, dated August 15, 1857, to secure bonds of which $2,926,000 in amount are outstanding, maturing October 1, 1920; fifth mortgage, dated June 1, 1858, to secure bonds of which $709,500 in amount are outstanding, maturing June 1, 1928.

Said New York and Erie Railroad Company, in accordance
21 with law, under date of June 1, 1858, mortgaged its property, rights, and franchises to James Brown and John C. Bancroft Davis, trustees for bondholders, which mortgage was afterwards foreclosed, and the said property, rights, and franchises duly sold and conveyed by deed of Philo T. Ruggles, referee in foreclosure proceedings, dated December 28th, 1861, to Dudley S. Gregory and John C. Bancroft Davis, trustees, which sale was duly confirmed by the Supreme Court of the State of New York.

The said trustees and their associates duly organized the Erie Railway Company—a body corporate—under the laws of the State of New York, and particularly chapter 160, laws of 1860, and chapter 119, laws of 1861, and in accordance with an act of the general assembly of the State of Pennsylvania passed March 22, 1860, known as "An act relating to the foreclosure and sale of the New York and Erie Railway Company." Under such foreclosure, and such statutes of New York and Pennsylvania and such reorganizations,

said Erie Railway Company lawfully acquired and became vested with all the rights, franchises, and property formerly held by the New York and Erie Railroad Company, and was authorized to mortgage the same.

3. For the purpose of furnishing an outlet from the anthracite coal region of Pennsylvania, and principally for the transportation of anthracite coal, a railroad was constructed by the Jefferson Railroad Company, prior to 1869, from Carbondale, Pa., to a con-
22 nection with the railroad of the Erie Railway Company at or near Lanesboro, Pa., a distance of about forty miles. Said Jefferson Railroad Company was incorporated and duly organized under the acts of the assembly of Pennsylvania, approved February 19, 1849; April 28, 1851; March 18, 1863, and holds letters patent granted February 15, 1864.

Said Jefferson Railroad Company has since constructed or acquired, principally for the transportation of anthracite coal, a railroad extending from Honesdale, Pa., to Hawley, Pa., a distance of nine miles, and also mine branches and tracks solely for the transportation of anthracite coal and mine supplies, extending from Erie Breaker to Edgerton, near Mayfield, a distance of two and a half miles, to reach Erie Breaker, near Mayfield, Pa., one mile, and to reach Glenwood Breaker, one mile.

The said branch to Edgerton Breaker was constructed and is now used solely for the transportation of anthracite coal from, and mine supplies to, the operations of the Temple Iron Company at Edgerton Colliery.

Said tracks to Erie Breaker and Glenwood Breaker were constructed and are now used solely for the purpose of the transportation of anthracite coal from, and mine supplies to, the said collieries owned and operated by the Hillside Coal and Iron Company.

The railroad of said Jefferson Railroad Company was built
23 at great expense and is constructed almost entirely through a mountainous and sparsely settled country to reach the anthracite coal region.

Over 80 per cent of the total tonnage transported by this defendant over the Jefferson Railroad is anthracite coal tonnage of the Pennsylvania Coal Company and the Hillside Coal and Iron Company, and over 70 per cent of the entire revenue from transportation by defendant over the railroad of Jefferson Railroad Company is derived from the transportation of anthracite coal tonnage of said Pennsylvania Coal Company and Hillside Coal and Iron Company. Substantially all of said coal is transported by defendant from Pennsylvania to other States. Under date of January 1, 1869, the Erie Railway Company leased the railroad of said Jefferson Railroad Company, and ever since that date said Erie Railway Company and its said successors, including this defendant, have leased and operated the same.

If defendant is prohibited from transporting to such other States coal owned, mined, or produced by said Pennsylvania Coal Company,

Hilside Coal & Iron Company, and Temple Iron Company, said railroad branches above referred to reaching said Erie, Edgerton, and Glenwood collieries will become substantially valueless and the value of said Jefferson Railroad and of its capital stock will be greatly impaired.

4. By chapter 66 of the laws of 1862 of the State of New
24 York the organization of said Erie Railway Company was ratified and affirmed, and said company was granted certain other rights, and it was provided:

"And if any corporation duly organized or to be organized in the State of New Jersey or Pennsylvania, shall undertake to construct a coal road to connect the same with the road of the Erie Railway Company between Oxford Station in Orange County and Deposit in the county of Delaware for the transportation of coal, said Erie Railway Company is hereby authorized to lease the said coal road, and to contract for the leasing and operation of the same, and for the transportation of coal over said coal road, and upon any road that may be owned or operated by said Erie Railway Company."

Pursuant to such authority, the Erie Railway Company entered into a contract, dated June 9, 1862, with a Pennsylvania corporation, the Pennsylvania Coal Company, whereby said Pennsylvania Coal Company did undertake to construct a coal road from a connection at Hawley, Pa., with its gravity railroad already constructed, to a connection with the Erie Railway Company's railroad between Oxford Station and Deposit as aforesaid. Under such contract said coal road was to be constructed for the transportation of coal from the mines of said Pennsylvania Coal Company in Pennsyl-
25 vania to the lines of said Erie Railway Company, and thereupon said Erie Railway Company was to lease said coal road and operate the same with its own engines, cars, and men; and the Erie Railway Company thereby undertook, pursuant to such authority, to transport such coal to interstate markets over its own lines of railroad.

Thereupon said Pennsylvania Coal Company constructed such coal road at great expense and the Erie Railway Company did thereupon lease and operate the same, and the coal of the Pennsylvania Coal Company was transported over such railroad to the railroad lines of said Erie Railway Company, and then transported by said Erie Railway Company over its railroad lines to markets in other States. By such contract, and succeeding contracts, the Erie Railway Company and its successors, including this defendant, came into possession of said coal road of the Pennsylvania Coal Company, operated said coal road and have transported the coal of said Pennsylvania Coal Company to interstate markets to this day.

Said Pennsylvania Coal Company and Erie and Wyoming Valley Railroad Company, a corporation organized under the laws of the State of Pennsylvania, at various times built at great expense other lines of railroad and mine branches in part to replace the gravity railroad of the Pennsylvania Coal Company above referred to, which

lines and branches, together with the coal road above referred to, subsequently became vested in and are now owned by said Erie
26 and Wyoming Valley Railroad Company, constituting a railroad with 75 miles of main track, 40 miles of yards and sidings, and 35 miles of mine branches and breaker tracks, owned by said company.

The main line of the railroad now owned by the Erie and Wyoming Valley Railroad Company was built solely for the purpose of transporting to market the coal owned, mined, or produced by the Pennsylvania Coal Company, and nearly all the branches thereof have been built solely for the purpose of reaching and transporting to market coal owned, mined, or produced by the Pennsylvania Coal Company or Hillside Coal and Iron Company.

A portion of the said railroad and its branches, constituting a mileage of 35 miles, was constructed and is now used solely for the purpose of transporting coal from, and mine supplies to, collieries of the Pennsylvania Coal Company and of Hillside Coal and Iron Company, and is so situated that no traffic from any other shipper, either of anthracite coal or otherwise, can be obtained, and if the coal of the Pennsylvania Coal Company and the Hillside Coal and Iron Company can not be carried by it, such portion of said railroad will be substantially valueless.

The Erie and Wyoming Valley Railroad Company has, at great cost, constructed upwards of forty miles of double track, tracks in yards and passing sidings solely for the accommodation and
27 transportation of the anthracite coal tonnage handled by it, which will be unnecessary, useless, and valueless for railroad purposes if it can not transport the tonnage of the Pennsylvania Coal Company and Hillside Coal and Iron Company.

Over 95 per cent of the total tonnage transported over the railroad of the Erie and Wyoming Valley Railroad Company is anthracite coal, and over 95 per cent of such anthracite coal is owned, mined, or produced by the Pennsylvania Coal Company and Hillside Coal and Iron Company, and more than 85 per cent of the total earnings from transportation over the said railroad is derived from the transportation of the anthracite coal of such companies. Practically all of such coal is transported by defendant from Pennsylvania to other States. Said Erie and Wyoming Valley Railroad is so situated that it can reach and transport practically no other coal tonnage than that shipped by the Pennsylvania Coal Company and the Hillside Coal and Iron Company, and that shipped from some of the mines of the Temple Iron Company.

If the railroad of said Erie and Wyoming Valley Railroad Company can not transport the anthracite coal so shipped by the Pennsylvania Coal Company and Hillside Coal and Iron Company, it can not be operated at a profit, and the value of said railroad and of the capital stock of said railroad company will be greatly impaired.

28 5. This defendant is the successor to all the rights, privileges, franchises, immunities, and property of the New York and

Erie Railroad Company through the foreclosure of a mortgage upon it, as aforesaid, and said sale December 28, 1861, and the reorganization into the Erie Railway Company in accordance with said statutes of Pennsylvania and New York in such case made and provided. It is likewise the successor to all the rights, privileges, franchises, immunities, and property of said Erie Railway Company through chapter 66, laws of New York for 1862, chapter 430, laws of New York for 1874, and an amendment thereof, chapter 446, laws of New York for 1876, and a mortgage upon such rights, privileges, franchises, immunities and property executed by said corporation February 4, 1874, the foreclosure of the last-mentioned mortgage, the sale of the property mortgaged April 24, 1878, the purchase of such property by the mortgagee and a reorganization of said railroad company by the formation of a new company designated as the New York, Lake Erie and Western Railroad Company, the mortgage of all the railroads, stocks, and other property, rights, privileges, immunities, and franchises, acquired by it (including the stock of the Hillside Coal and Iron Company and of the Jefferson Railroad Company, which had been acquired by defendant's predecessors many years previously) to the Farmers' Loan & Trust Company, October 5, 1878, the
29 foreclosure of the last mentioned mortgage in the United States Circuit Court for the Southern District of New York, and the sale of its property to duly appointed representatives of its mortgage bondholders, November, 1895, the reorganization of said corporation under the statutes of New York and in accordance with the decrees and orders of said court, November 14, 1895, whereby this defendant obtained good title in and to, and became the lawful owner of the property, rights, privileges, immunities, and franchises, of all its predecessors aforesaid, including the shares of capital stock of coal companies and of railroad companies, as well as the railroads theretofore held and possessed by its said predecessor companies, the railroads so owned by it and by its said subsidiary companies having an aggregate mileage of over 2,100 miles, in the States of New York, Pennsylvania, New Jersey, Ohio, Indiana, and Illinois.

6. Said Pennsylvania Coal Company was organized as a corporation of Pennsylvania by act of the general assembly, No. 73, laws of 1838 of the State of Pennsylvania, which act gave such corporation the right of "transacting the usual business of companies engaged in mining, transporting to market, and selling coal and the other products of coal mines." For that purpose it was given the power to purchase or lease coal lands in Pennsylvania; also the power to "construct railroads with one or more tracks." Such power to buy and hold
30 coal lands, mine and sell coal, construct, extend, and operate railroads was from time to time enlarged so as to cover more lands for mines, railroads, wharves, and depots by the following acts of the general assembly of the State of Pennsylvania, viz: Act No. 155, laws 1839; act No. 57, laws 1841; act No. 116 and act No. 354, laws 1849; act No. 250, laws 1850 of the laws of Pennsylvania. In particular by act of general assembly No. 140, laws of Pennsylvania

for 1853 said Pennsylvania Coal Company was authorized to extend its railroad to connect with the New York and Erie Railroad; also said Pennsylvania Coal Company was authorized to "connect or consolidate with, or lease, some railroad, or canal, in said States of New Jersey or New York, and acquire, hold, and exercise the rights, privileges and franchises of such corporations." The right of said Pennsylvania Coal Company to buy coal lands and build railroad connections was further extended by act No. 85, of said general assembly, laws 1857; act No. 366, laws 1864; act No. 634, laws 1867; act No. 1018, laws of Pennsylvania for 1868. In each case said Pennsylvania Coal Company proceeded to exercise the authority so vested in it, and thereupon it issued capital stock and evidences of indebtedness, obtained much capital, acquired coal lands, developed coal mines, produced, transported to markets, and sold, coal; built and operated railroads with depots and terminals, made railway connections so
31 authorized, and did other like acts to promote such business of supplying all persons needing the same with anthracite coal; and said corporation thus obtained, and now enjoys, a large interstate business in mining, producing, and selling anthracite coal.

Because of the location of said mines of said corporation, the railway and connections of said Pennsylvania Coal Company naturally brought the coal of said corporation to the predecessors of this defendant, and still bring such coal to this defendant.

7. The Hillside Coal and Iron Company was organized as a corporation of Pennsylvania by act of its general assembly No. 1279, laws of Pennsylvania for 1869, and given power to "purchase and hold in fee simple, by lease or otherwise coal, iron, mineral, and lumber lands in this Commonwealth, not exceeding at any one time 5,000 acres, with power to connect said lands by railroad not exceeding twenty miles in length with other railroads, canals, or public improvements;" also power to use its capital in "purchasing, mining, vending, and transporting, coal, iron, lumber, and other products of their lands; in manufacturing, vending, and transporting iron and other materials and metals, and in such other objects as may be considered necessary and expedient in the prosecution of said business."

Under an act of the general assembly of the State of Pennsylvania, approved April 18, 1867, and under an agreement of merger
32 adopted December 24, 1873, said Hillside Coal & Iron Company was merged and consolidated with the Keystone Coal Company, Sugar Cabin Coal Company, Standard Coal Company, and North Mountain Coal Company, corporations organized under various special acts of the general assembly of the State of Pennsylvania granting to said companies, respectively, various rights to mine, transport, and sell coal and construct railroads and, in particular, act No. 1030 of said general assembly, laws of 1873, and act No. 532 of said general assembly, laws of 1862, affecting the said Standard Coal Company, which provide, among other things, that any incorporated railroad company shall have the power to subscribe to the capital stock of said company.

By act of said general assembly No. 1309, laws of Pennsylvania for 1869, said corporation was authorized to increase its capital to not to exceed 30,000 shares.

The said corporation, Hillside Coal and Iron Company, proceeded to act upon such authority, and to issue stock and evidences of indebtedness, obtain large capital, buy coal and lumber lands, develop coal mines and railroads, manufacture lumber, and to transport and sell coal. The said corporation thus came to have a large interstate business in supplying the fuel needs of many citizens of many States. The mines of said corporation have been conveniently reached by the railroad lines of this defendant and its predecessor, and they have transported such coal to interstate markets.

33 8. Said corporations, said Pennsylvania Coal Company and said Hillside Coal and Iron Company are still mining, producing, transporting, and selling large quantities of such coal to supply the great demand for fuel among citizens of various States outside of Pennsylvania. Said companies annually mine, produce, and sell several million tons of such coal in said markets, outside of Pennsylvania, more than ninety per cent of such coal being consumed outside of Pennsylvania. Over 70,000,00 tons per annum of anthracite coal is now produced in Pennsylvania, but there is no sufficient market in Pennsylvania therefor, over eighty per cent thereof being necessarily marketed in other States, and in Canada. Over ninety per cent of the anthracite coal traffic of this defendant is furnished by the Pennsylvania Coal Company and the Hillside Coal and Iron Company, substantially all of which is transported by it from Pennsylvania to other States, and the bulk of which is marketed at points on the lines of this defendant in such other States. The anthracite coal tonnage furnished this defendant by said coal corporations for the year ending June 30, 1907, was over twenty-two per cent of its entire freight tonnage, and defendant's revenue therefrom was over 20 per cent of its total revenue from transportation.

34 9. A large amount of the coal mined or produced by said Pennsylvania Coal Company and Hillside Coal and Iron Company is consumed by this defendant in the operation of its railroad, such consumption of coal in the year ending June 30th, 1907, amounting to nearly 400,000 tons.

On account of the greater cleanliness of anthracite coal as compared with bituminous coal, competitive reasons, police regulations of growing centers of population and other reasons, the consumption of anthracite coal for railroad fuel purposes is increasing and will tend to further increase. Such use of anthracite coal suitable for domestic use would be wasteful and extravagant on account of the higher price and value of such coal. The smaller sizes of anthracite coal suitable for locomotive fuel purposes, are a by-product of the production of the more valuable sizes of coal suitable for domestic purposes. The proportion of the total product of such smaller sizes in the mining of coal is, with the Pennsylvania Coal Company and the Hillside Coal and Iron Company, about 35 per cent at the present

time. The mines of said Pennsylvania Coal Company and Hillside Coal and Iron Company could not be operated solely for the production of railroad fuel coal without wasteful and ruinous extravagance.

It is important for the purposes of the future operation of the railroad of this defendant that it be secured an available supply of anthracite coal for its fuel purposes, for its own protection and the protection of the public against failure or interruption of supply for such use.

35 10. This defendant denies that it owns the anthracite coal lands, or coal, of the Pennsylvania Coal Company, or the Hillside Coal & Iron Company, or the Temple Iron Company, or any other anthracite coal lands, directly or indirectly in whole or in part. It alleges that it has no interest therein direct or indirect, as it is advised by counsel learned in the law, although it admits and alleges that long before the commodity clause was enacted this defendant, or its said predecessors in interest, did lawfully acquire nearly all the capital stock of the Pennsylvania Coal Company and the Hillside Coal & Iron Company, and a small minority of the stock of the Temple Iron Company.

And this defendant admits and alleges that as a stockholder of the Pennsylvania Coal Company and of the Hillside Coal & Iron Company it has voted for directors of said corporations, as it lawfully might do; but this defendant denies that it has managed or is managing those corporations, and alleges that its relations to and with them have not been other than as a stockholder thereof. On the contrary, it admits and alleges that they have been lawfully managed, respectively, by their own directors and by their respective officers lawfully chosen by said directors. And this defendant denies that it has managed the Temple Iron Company or authorized it to do any business whatever, and alleges that its relations to and with said company have not been otherwise than as a stockholder thereof. It denies it has sold the coal of any of said corporations.

36 This defendant admits and alleges that since May 1, 1908, it has been, is now, and for many years has been transporting the coal of said corporations to markets outside the State of Pennsylvania, many of which markets can only be reached over the railroad lines of this defendant; that such coal mines are most economically and naturally reached by lines of this defendant with which they have been so connected for many decades, and most of them are not reached by any other line of railroad, and other lines could not be constructed to reach many of them except at prohibitive cost.

This defendant and its predecessors, long prior to the passage of said amendment of the interstate commerce act acquired substantially all the capital stock of said Pennsylvania Coal Company, Hillside Coal & Iron Company, Jefferson Railroad Company, and Erie and Wyoming Railroad Company, and pledged the same under various of their mortgages, under and pursuant to which there have been issued and are now outstanding bonds for large sums aggregating many millions of dollars, which bonds are held by purchasers in good

faith and for value throughout the world, in reliance upon the property mortgaged and pledged, including the railroad of this defendant and the said stocks which form necessary and substantial portions of the security for said bonds.

It alleges that the business of producing or mining anthracite
37 coal is not a business of such a nature that said commodity clause is a reasonable or lawful regulation of interstate transportation thereof.

11. This defendant denies that the operation, mining or producing of coal by any corporation, or company so called, has been, or now is carried on under the management or authority of this defendant; or that it has been or now is the owner, in whole or in part, of any coal transported by it as a part of interstate commerce; or that it has had, or now has any interest, direct or indirect, in any coal transported to interstate markets by it; or that it has violated, or failed to comply with the so-called commodity clause of the interstate commerce act; or that it is engaged in any unlawful transportation of coal; or that it intends hereafter to violate such clause by unlawfuly transporting any coal to interstate markets. On the contrary, this defendant alleges that as a common carrier it is its duty to continue to transport such coal of the Pennsylvania Coal Company, the Hillside Coal and Iron Company, and the Temple Oron Company to citizens demanding it at interstate and other markets upon the same terms and conditions as those upon which this defendant transports other like coal to citizens of the United States and of the several States at such markets; and that interstate consumers of such coal, citizens of the United States and the several States, have the right
to exercise liberty of contract and those constitutional rights
38 and immunities of citizens of the United States and the several States, secured to them by various provisions of the Constitution of the United States and of the amendments thereto; and that they may buy and burn such coal as fuel as they choose to buy and burn instead of being forced through said commodity clause to buy and burn wood as fuel under the same circumstances and conditions. Defendant alleges that such citizens in the exercise of their rights and immunities as citizens of the United States, and of the several States, have the right to enjoy the just and equal protection of the laws, and liberty of contract, and to continue to buy and burn such particular anthracite coal; and that to enable such citizens to enjoy such constitutional rights, among others, it is the duty of the Government of the United States and of this high court, to protect this defendant in continuing to transport such coal, for otherwise the constitutional rights of said citizens, and of this defendant, and its stockholders and bondholders, will be impaired or destroyed.

12. To acquire title to all its property, rights, and franchises, and to improve and extend the same by purchase and otherwise, this defendant borrowed much capital, and was compelled to mortgage and pledge such property or parcels thereof, from time to time. All its

stock in said coal corporations has long since become collateral security for some one or more of such mortgages held by trustees
39 for bondholders, many thousands in number, and the same contain no provisions for releasing the stock of said coal corporations.

The dates and amounts of some of such mortgages are the following:

December 10, 1895, first consolidated mortgage deed to Farmers' Loan and Trust Company, due January 1st, 1996, securing bonds, of which there are outstanding $80,342,000;

February 1, 1901, Pennsylvania collateral indenture to the Mercantile Trust Company securing $36,000,000 bonds due February 1st, 1951, of which are outstanding $34,000,000;

April 1, 1903, general mortgage to the Standard Trust Company of New York securing $50,000,000 bonds due April 1st, 1953, of which there are outstanding $22,000,000.

Copies of said first consolidated mortgage deed, said Pennsylvania indenture, and said general mortgage, are hereunto annexed, marked Exhibits "A," "B," and "C," respectively, and made a part of this answer.

Said bonds are held by purchasers thereof in good faith for value, in reliance upon the property mortgaged and pledged, including the said stocks which form necessary and substantial portions of the security for said bonds. A great number of said bondholders
40 are citizens of the United States, and of the several States and are entitled to enjoy all their constitutional rights and immunities as such, and to have this defendant enjoy all its, in order that the contracts of this defendant and of said trustees and bondholders may not be impaired or destroyed, and that their securities and property, and those of this defendant, may not be taken, impaired, or destroyed without due process of law, or just compensation, contrary to the Constitution of the United States in such case made and provided. If such commodity clause be construed to apply to this defendant, the rights and property of this defendant, and of its stockholders, and of its trustees and creditors and bondholders will be impaired and destroyed contrary to the Constitution of the United States.

Defendant for greater certainty and in support of its denials and allegations herein contained, prays leave to refer, as a part hereof, to all of the acts of the New York legislature, and of the general assembly of Pennsylvania, and to all of the mortgages, charters, and articles of incorporation herein referred to, as if the same were set forth at large herein.

13. If that part of the interstate commerce act commonly called the commodity clause is so construed as to prohibit this defendant from transporting anthracite coal from Pennsylvania to markets outside the State of Pennsylvania, in cases where this defendant is a
41 stockholder in the corporation owning, mining, or producing the same, then this defendant pleads that such commodity

clause violates the Constitution of the United States, and is null and void in that:

(a) It will, in effect, prohibit commerce between the States, which commerce is not harmful, but beneficial, and it is not in any proper or legal sense a regulation of commerce, whereas, under the United States Constitution, article one, section eight, Congress is granted power only to regulate such interstate commerce.

(b) It will deny full faith and credit to the public acts of the State of New York incorporating this defendant and granting it the right to own and hold stock in corporations of the State of Pennsylvania, and to the public acts of the State of Pennsylvania granting this defendant the right to own stock in mining corporations of Pennsylvania, and to build, lease, and operate railroads, and to transport coal and other commodities therein produced to markets in other States, contrary to article four, section one, of the United States Constitution.

(c) It will deny to this defendant and numerous citizens of the States of Pennsylvania, New York, and other States of the United States, bondholders of, and stockholders in this defendant, the privileges and immunities of citizens of the several States, contrary to article four, section two, subdivision one, of the Constitution of the United States.

42 (d) It will deprive this defendant and numerous persons who are its stockholders, and bondholders, and citizens of the United States and of the several States thereof, of liberty and property without due process of law, and take from them private property without just compensation, contrary to the fifth amendment to the Constitution of the United States.

(e) It will subject this defendant, its directors, officers, lessees, agents, and other persons acting for or employed by it, and its stockholders, to excessive fines, and cruel and unusual punishments, contrary to the eighth amendment to the Constitution of the United States.

(f) It will deny to defendant and its stockholders, and bondholders, and disparage, those certain rights possessed by the people of the several States when the Constitution of the United States and the amendments thereto were adopted and which were retained by the people under the Constitution and especially by the ninth and tenth amendments thereof, among which rights are the liberty to make innocent contracts and do innocent business upon the same terms and conditions permitted to all other persons, the right to use, sell, or enjoy property acquired by lawful contract, the right to have such contracts continue unimpaired, and the right to that justice and the equal protection of the laws which the Constitution was established to make secure to all persons; and it will exceed the limita-

43 tions imposed on the powers of Congress by the nature of the Federal Government, and the fundamental principles thereof.

(g) It will deny to this defendant and its stockholders and bondholders, who are citizens of the United States and of the State of

Pennsylvania, or New York, their certain rights in real estate, and in corporations of said States, and in business in each of said States, and in the United States, contrary to the rights reserved to them, and granted to them by section two of article four, and by the fifth, eighth, ninth, tenth, and fourteenth amendments of the Constitution of the United States.

Wherefore, this defendant having fully answered the bill of complaint herein, or so much thereof as it is material for it to answer, prays this honorable court to enter its decree that this defendant be hence dismissed, and for such other relief in the premises as to this honorable court may seem meet and in accordance with equity.

ERIE RAILROAD COMPANY,
By JOSEPH E. PACKER,
Ass't Secretary.
GEORGE F. BROWNELL,
Solicitor and Counsel for Defendant.

ADELBERT MOOT,
Of Counsel.

44 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Joseph E. Packer, being duly sworn, deposes and says that he is ass't secretary of the Erie Railroad Company, the defendant above named; that he has read the foregoing answer of said defendant, and that the same is true to the best of his knowledge, information, and belief.

JOSEPH E. PACKER.

Sworn to before me this 6th day of June, 1908.
[SEAL.] A. L. TRAVIS,
Notary Public, No. 75, Kings County.

Certificate filed in New York County.

45 *First consolidated mortgage deed.*

Erie Railroad Company to the Farmers' Loan and Trust Company, trustee. Dated December 10, 1895. Stetson, Tracy, Jennings & Russell, general counsel, 15 Broad street, New York.

47 This indenture, made this tenth day of December, in the year one thousand eight hundred and ninety-five, between

Erie Railroad Company, a corporation created by, and existing under, the laws of the State of New York, hereinafter called the "railroad company," party of the first part, and

The Farmers' Loan and Trust Company, of New York, a corporation created by and existing under the laws of the State of New York, hereinafter called the "trustee," party of the second part.

Whereas, the railroad company, party of the first part, owns, possesses, controls, or leases divers lines of railway, together with franchises, rights, privileges, lands, tenements, and hereditaments there-

unto belonging or appertaining, on which lines of railway or various portions thereof and of the equipment thereof, bonds, secured by mortgages, and other liens are now outstanding;

And whereas the railroad company owns various stocks and bonds, including stock and bonds of the Chicago and Erie Railroad Company, a corporation of Indiana;

And whereas all such railroads, properties, leaseholds, stocks, and bonds have been received by the railroad company by, under, or in pursuance of a certain plan of reorganization of the New York, Lake Erie and Western Railroad Company and subordinate companies, and of the transfer to it, or for its benefit, of various stocks, bonds, and other properties so transferred to or for its benefit by Charles H. Coster, Louis Fitzgerald, and Anthony J. Thomas,
48 the committee named in the certificate of incorporation of the railroad company, upon the express promise and agreement of the railroad company, among other things, to make, execute, issue, and use its bonds as herein provided, including a limited issue thereof from time to time to be made to the said Coster, Fitzgerald, and Thomas jointly, and not severally, or their survivors or successors, and further issues thereof to be made for the redemption and acquisition of bonds and stocks, and equipment liens and for new acquisitions, construction, and betterments, all as herein provided;

And whereas the board of directors of the railroad company, at a meeting thereof held at New York on the nineteenth day of November, in the year eighteen hundred and ninety-five, adopted a resolution in the following words—that is to say:

"*Resolved*, That the president and the secretary of the Erie Railroad Company be, and they are hereby, authorized and directed, in its behalf and under the corporate seal, when approved by the stockholders, and in form substantially that now submitted to this board, to execute and deliver a mortgage or deed of trust upon the property and franchises of the corporation, to be known as its "First consolidated mortgage deed," to The Farmers' Loan and Trust Company, as trustee, to secure two issues of bonds, one to the aggregate amount of $35,000,000, to be called "Prior lien bonds," and the other and remaining issue of bonds, to the aggregate amount of $140,000,000, to be called "General lien bonds," the principal of both such issues of bond sto be payable in gold coin of the United States, of the present standard of weight and fineness, at the office or agency of this company in the city of New York, on the 1st day of January, 1996, with interest thereon at the rate of four per cent per annum, except that for two years from July 1st, 1896, the general lien bonds shall bear interest at the rate of three per cent per annum; all interest to be payable semiannually in like gold coin at the said office or agency on the first days of January and July in each year: such bonds to be issued and disposed of on the terms and conditions, for the purposes, and in the manner set forth in said form of mortgage."

49 And whereas, it was also resolved by the board of directors of the railroad company at said meeting that the president,

or any vice-president, and the secretary, or any assistant secretary of the railroad company or of any railroad company being lawful and sole successor to the railroad company for the time being, should from time to time, as directed by the board of directors of the railroad company or of its said successor, execute, in the behalf and name of the railroad company, and under its corporate seal, the two issues of bonds, to be secured by the said mortgage to the aggregate amount of one hundred and seventy-five million dollars ($175,000,000), the said two issues to be respectively: "Prior lien bonds," for an aggregate principal amount of $35,000,000, and "general lien bonds," subordinate and subject in lien to the prior lien bonds, for an aggregate principal amount of $140,000,000; such bonds to be substantially of the following tenor, to wit:

(Form of prior lien bond.)

No. $1,000.

UNITED STATES OF AMERICA.

Erie Railroad Company, prior lien four per cent gold bonds. Secured by first consolidated mortgage deed.

Know all men by these presents, that Erie Railroad Company, a corporation hereinafter called the "railroad company," for value received, promises to pay to the bearer, or, if registered, to the registered holder, one thousand dollars in gold coin of the United States of the present standard of weight and fineness, on the
50 first day of January, in the year 1996, at the office or agency of the railroad company in the city of New York, N. Y., with interest at the rate of four per cent per annum from January 1, 1896, payable semiannually at said office or agency in like gold coin on the first days of January and July in each year, but only upon surrender of the annexed coupons therefor as they severally mature.

Both the principal and interest of this bond are payable without deduction for any tax or taxes which the railroad company may be required to pay or to retain therefrom, under or by reason of any present or future law, the railroad company hereby agreeing to pay all such tax or taxes.

This bond is one of a series of coupon and registered bonds of the railroad company, known as "Prior lien bonds," duly authorized and approved by the directors and stockholders of the railroad company, issued and to be issued, but so that the aggregate amount of such prior lien bonds at any one time outstanding shall never exceed the total sum of $35,000,000. All of such prior lien bonds are equally secured by a mortgage deed dated December 10th, 1895, executed by said railroad company to the Farmers' Loan and Trust Company of New York, as trustee, of all the property and franchises of the railroad company mentioned in said mortgage deed, to which reference is hereby made for a description of the property and franchises mort-

gaged and the nature and extent of the security and the rights of the holders of said bonds under the same.

This bond may be registered as to principal in the owner's name on the company's books, at its office or agency in the city of New York, such registry being noted on the bond by the company's transfer agent, after which no transfer shall be valid unless made on the company's books by the registered owner, and similarly noted on the bond; but the same may be discharged from registry by being transferred to bearer, after which transferability by delivery shall be restored; but it may again from time to time be registered
51 or transferred to bearer as before; such registration, however, shall not affect the negotiability of the coupons by delivery merely. This bond is also exchangeable for registered bonds without coupons, as provided in said mortgage or deed of trust.

After the expiration of the voting trust authorized in the certificate of incorporation, the holder hereof shall have the right to vote as described in said certificate.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate hereon endorsed of the trustee under said mortgage deed.

In witness whereof, the Erie Railroad Company has caused these presents to be signed by its president or one of its vice-presidents, and its corporate seal to be hereunto affixed, and to be attested by its secretary or assistant secretary, and coupons for said interest with the engraved signature of its treasurer to be attached hereunto this tenth day of December, 1895.

ERIE RAILROAD COMPANY,
By , *President.*

Attest:
, *Secretary.*

(Form of interest coupon, of which the first is to be payable July 1, 1896.)

On the first day of , , Erie Railroad Company will pay the bearer at its agency in the city of New York, N. Y., twenty dollars in gold coin, without deduction for taxes, being six months' interest then due on its prior lien bond No. .

Treasurer.

52 (Form of registered prior lien bond.)

UNITED STATES OF AMERICA.

Erie Railroad Company, prior lien four per cent registered gold bond. Secured by first consolidated mortgage deed.

No. P. R. $——

Know all men by these presents: That Erie Railroad Company, a corporation hereinafter called the "railroad company," for value received, promises to pay or assigns, the sum of

dollars, in gold coin of the United States of the present standard of weight and fineness, on the first day of January, in the year 1996, at the office or agency of the railroad company in the city of New York, and to pay interest thereon from the first day of January or July, as the case may be, next preceding the date hereof, at the rate of four per cent per annum, payable semiannually in like gold coin, at said office or agency, on the first days of January and July in each year, until payment of said principal sum.

Both the principal and interest of this bond are payable without deduction for any tax or taxes which the railroad company may be required to pay or to retain therefrom under or by reason of any present or future law; the railroad company hereby agreeing to pay all such tax or taxes.

This bond is one of a series of coupon bonds and registered bonds of the railroad company, known as prior lien bonds, duly authorized and approved by the directors and stockholders of the railroad company, issued and to be issued, but so that the aggregate amount of such prior lien bonds, both coupon and registered, at any
53 one time outstanding, shall never exceed the total sum of $35,000,000. All of such prior lien bonds are equally secured by a mortgage deed, dated December 10th, 1895, executed by said railroad company to the Farmers' Loan and Trust Company of New York, as trustee, of all the property and franchises of the railroad company mentioned in said mortgage deed, to which reference is hereby made for a description of the property and franchises mortgaged, and the nature and extent of the security and the rights of the holders of said bonds under the same, and the terms and conditions upon which said bonds are issued and secured.

This bond is transferable by the registered holder thereof, in person or by attorney duly authorized, on the company's books at its office or agency in the city of New York, upon surrender and cancellation of this bond, and a new registered bond will be issued to the transferee in exchange therefor, as provided in said mortgage deed.

After the expiration of the voting trust authorized in the certificate of incorporation, the holder hereof shall have the right to vote as described in said certificate.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon endorsed, of the trustee under said mortgage deed.

In witness whereof, the Erie Railroad Company has caused these presents to be signed by its president, or one of its vice-presidents, and its corporate seal to be hereunto affixed, and to be attested by its secretary or assistant secretary this day of .

ERIE RAILROAD COMPANY,

By , *President.*

Attest:

, *Secretary.*

54 (Form of general lien bond.)

No. $1,000.

UNITED STATES OF AMERICA.

Erie Railroad Company, general lien gold bond. Secured by first consolidated mortgage deed.

Know all men by these presents, that Erie Railroad Company, a corporation hereinafter called the "railroad company," for value received, promises to pay to the bearer, or, if registered, to the registered holder, one thousand dollars in gold coin of the United States of the present standard of weight and fineness on the first day of January, in the year 1996, at the office or agency of the railroad company in the city of New York, N. Y., with interest from July 1, 1896, at the rate of three per cent per annum for two years and at the rate of four per cent per annum thereafter, payable semi-annually at said office or agency in like gold coin on the first days of January and July in each year, but only upon surrender of the annexed coupons therefor as they severally mature.

Both the principal and interest of this bond are payable without deduction for any tax or taxes which the railroad company may be required to pay or to retain therefrom, under or by reason of any present or future law, the railroad company hereby agreeing to pay all such tax or taxes.

This bond is one of a series of coupon and registered bonds of the railroad company, known as "general lien bonds," duly authorized and approved by the directors and stockholders of the railroad
55 company, issued and to be issued, but so that the aggregate amount of such general lien bonds at any one time outstanding shall never exceed the total sum of $140,000,000.

All of such general lien bonds are equally secured by a mortgage deed dated December 10th, 1895, executed by said railroad company to the Farmers' Loan & Trust Company, of New York, as trustee, of all the property and franchises of the railroad company mentioned in said mortgage deed, to which reference is hereby made for a description of the property and franchises mortgaged and the nature and extent of the security and the rights of the holders of said bonds under the same.

This bond may be registered as to principal in the owner's name on the company's books at its office or agency in the city of New York, such registry being noted on the bond by the company's transfer agent, after which no transfer shall be valid unless made on the company's books by the registered owner, and similarly noted on the bond; but the same may be discharged from registry by being transferred to bearer, after which transferability by delivery shall be restored; but it may again from time to time be registered or transferred to bearer as before; such registration, however, shall not affect the negotiability of the coupons by delivery merely. This bond is

23

also exchangeable for registered bonds without coupons, as provided in said mortgage or deed of trust.

After the expiration of the voting trust authorized in the certificate of incorporation the holder hereof shall have the right to vote as described in said certificate.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate hereon endorsed, of the trustee under said mortgage deed.

In witness whereof, the Erie Railroad Company has caused these presents to be signed by its president, or one of its vice-presidents, and its corporate seal to be hereunto affixed, and to be attested by its secretary or assistant secretary, and coupons for said interest
56 with the engraved signature of its treasurer to be attached hereunto, this tenth day of December, 1895.

ERIE RAILROAD COMPANY,
By , *President.*

Attest:
, *Secretary.*

(Form of interest coupon, of which the first is to be payable January 1, 1897.)

On the first day of Erie Railroad Company will pay the bearer at its agency in the city of New York, N. Y., dollars in gold coin, without deduction for taxes, being six months' interest then due on its general lien bond No.

Treasurer.

(Form of registered general lien bond.)

UNITED STATES OF AMERICA.

Erie Railroad Company, general lien registered gold bond. Secured by first consolidated mortgage deed.

No. G. R. $ ——.

Know all men by these presents, that Erie Railroad Company, a corporation hereinafter called the "railroad company," for value received, promises to pay or assigns, the sum of dollars in gold coin of the United States of the present standard of weight and fineness on the first day of January, in the year 1996, at the office or agency of the railroad company in the city of New
57 York, and to pay interest thereon from the first day of January or July, as the case may be, next preceding the date hereof, at the rate of three per cent per annum from July 1st, 1896, to June 30th, 1898, and four per cent per annum thereafter, payable semi-annually in like gold coin, at said office or agency, on the first days of January and July in each year, until payment of said principal sum.

Both the principal and interest of this bond are payable without deduction for any tax or taxes which the railroad company may be

required to pay, or to retain therefrom under or by reason of any present or future law, the railroad company hereby agreeing to pay all such tax or taxes.

This bond is one of a series of coupon bonds and registered bonds of the railroad company, known as general lien bonds, duly authorized and approved by the directors and stockholders of the railroad company, issued and to be issued, but so that the aggregate amount of such general lien bonds, both coupon and registered, at any one time outstanding, shall never exceed the total sum of $140,000,000. All of said bonds are equally secured by the mortgage deed, dated December 10th, 1895, executed by said railroad company to the Farmers' Loan and Trust Company of New York as trustee of all the property and franchises of the railroad company mentioned in said mortgage deed, to which reference is hereby made for a description of the property and franchises mortgaged, and the nature and extent of the security and the rights of the holders of said bonds under the same, and the terms and conditions upon which said bonds are issued and secured.

This bond is transferable by the registered holder thereof, in person or by attorney duly authorized, on the company's books at its office or agency in the city of New York upon surrender and cancellation of this bond, and a new registered bond will be issued to the transferee in exchange therefor, as provided in said mortgage deed.

After the expiration of the voting trust authorized in the
58 certificate of incorporation the holder hereof shall have the right to vote as described in said certificate.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon endorsed, of the trustee under said mortgage deed.

In witness whereof, the Erie Railroad Company has caused these presents to be signed by its president, or one of its vice-presidents, and its corporate seal to be hereunto affixed and to be attested by its secretary or assistant secretary this day of .

ERIE RAILROAD COMPANY,

By , *President.*

Attest:

, *Secretary.*

And whereas the coupons to be attached to said bonds of both issues are to be authenticated by the engraved signature of the present treasurer or of any future treasurer of the railroad company, or of any successor company, it being intended that the railroad company and any such successor company may adopt and use for that purpose the engraved signature of any such treasurer, notwithstanding the fact that such person may have ceased to be such treasurer at the time when any such bonds shall be actually certified and delivered;

And whereas it was further resolved that there shall be endorsed on each of such bonds of both issues a certificate of the trustee, which certificate shall be the conclusive and only evidence that such bonds

are entitled to the security of the mortgage or deed of trust therein mentioned, and that no bond shall be valid or obligatory for any purpose until such certificate shall have been executed by the trustee, such certificate, in respect of said two issues severally and respectively, to be substantially of the following tenor, viz:

59 I.

(Form of trustee's certificate as to prior lien bonds.)

This bond is one of the series of prior lien bonds described in the within-mentioned mortgage deed, executed by the Erie Railroad Company to the undersigned.

THE FARMERS' LOAN AND TRUST COMPANY,
Trustee.

By , *Vice-President.*

II.

(Form of trustee's certificate as to general lien bonds.)

This bond is one of the series of general lien bonds described in the within-mentioned mortgage deed, executed by the Erie Railroad Company to the undersigned.

THE FARMERS' LOAN AND TRUST COMPANY,
Trustee.

By , *Vice-President.*

And whereas, subsequently, to wit, on the 19th day of November, 1895, all the stockholders of the railroad company, owning and holding every share of its capital stock, namely, three hundred thousand shares of first preferred stock, one hundred and sixty thousand shares of second preferred stock, and one million shares of the common stock of said corporation, did, in the manner and form provided by and in section 2 of the stock corporation law of the State of New York, consent to the issue of this mortgage, which consent is in writing, and has been filed and recorded in the office of the clerk of the city and county of New York, and also in the office of the register of the city and county of New York, that being the county in which the railroad company has its principal place of business.

And whereas the printed form of mortgage submitted to and approved by the board of directors at their said meeting, and submitted to the stockholders of the corporation at the time of the execution of their consent as aforesaid, was in the form of this indenture.

60 And whereas, in pursuance of said resolutions and consent and of all and every legal power and authority in it vested,

the railroad company proposes to make and execute and from time to time to issue and deliver bonds of both the issues secured hereby.

Now, therefore, this indenture witnesseth:

That in order to secure the payment of the principal and interest of all such bonds at any time outstanding and lawfully issued, as provided in such bonds and in this indenture, and the performance of all the covenants and conditions herein contained,

The railroad company, party of the first part, in consideration of the premises and of the purchase and acceptance of such bonds by the holders thereof, and of the sum of one dollar to it duly paid by the trustee at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has executed and delivered these presents with all the covenants and conditions thereof, and has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred, and set over, and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer, and set over unto the trustee, party of the second part, its successors and assigns, forever:

All the estate, right, title, and interest of the railroad company of, in, and to, all and singular, the railway of the railroad company from and including Piermont, on the Hudson River in the State of New York, to and including the terminus of the said railway on Lake Erie at or near Dunkirk in said State, and the railway known as the Newburgh Branch, from Newburgh to the main line, and also all
61 that part of the railway designated as the Buffalo Branch of the Erie Railway extending from Hornellsville to Attica, in the State of New York; also that part of the railway known as the Newburgh and New York Railroad, extending from Turners on the main line to Vail's Gate on the Newburgh Branch; also the railway formerly belonging to the Lockport and Buffalo Railroad Company and extending from Lockport to Black Rock, both in the State of New York; also the railway formerly belonging to the Erie International Railway Company, and extending from a point of connection with Suspension Bridge and Erie Junction Railroad in Niagara County to International Bridge in Erie County, both in the State of New York; and also all other railways now belonging to the railroad company in the States of New York, Pennsylvania, and New Jersey, or any of them; also all the estate, right, title, and interest, terms and remainder of terms, franchises, privileges, and rights of action of whatsoever name or nature in law or in equity conveyed or assigned unto the New York and Erie Railroad Company, or unto the Erie Railway Company, or to the New York, Lake Erie and Western Railroad Company, by the Union Railroad Company, a corporation existing under the laws of the State of New Jersey; by the Buffalo, New York and Erie Railroad Company, a corporation existing under the laws of the State of New York; by the Bergen County Railroad, a corporation existing under the laws of the State of New Jersey; by the Buffalo, Bradford and Pittsburg

Railroad Company, a corporation existing under the laws of the States of New York and Pennsylvania; by the Rochester and Genesee Valley Railroad Company, a corporation existing under the laws of the State of New York; by the Long Dock Company, a corporation existing under the laws of the State of New Jersey; by the Goshen and Deckertown Railroad Company, a corporation existing under the laws of the State of New York; by the Hoboken Land and Improvement Company, a corporation existing under the laws
62 of the State of New Jersey; by the New York and Fort Lee Railroad Company, a corporation existing under the laws of the State of New Jersey, and the New Jersey Junction Railroad Company, a corporation existing under the laws of the State of New Jersey; by the Jefferson Railroad Company, a corporation existing under the laws of the State of Pennsylvania; by the Montgomery and Erie Railroad Company, a corporation existing under the laws of the State of New York; by the New York, Lake Erie and Western Docks and Improvement Company, a corporation existing under the laws of the State of New Jersey; by the Paterson, Newark and New York Railroad Company, a corporation existing under the laws of the State of New Jersey; by the Pennsylvania Coal Company, a corporation existing under the laws of the State of Pennsylvania; by the Newark and Hudson Railroad Company, a corporation existing under the laws of the State of New Jersey; and by the Suspension Bridge and Erie Junction Railroad Company, a corporation existing under the laws of the State of New York.

And also all the railroad formerly of the Buffalo and Southwestern Railroad Company, extending from Jamestown, in Chautauqua County, to Buffalo, in Erie County, both in the State of New York, subject only to two mortgages thereon prior to the lien of this indenture; the first to secure an issue of bonds for $1,500,000, the second, executed November 19th, 1895, by the railroad company to secure an issue of its bonds for $1,000,000.

And also all the estate, right, title, and interest of the railroad company in and to certain real estate situate in Hudson County, in the State of New Jersey, known as the Penhorn property, and to two certain other parcels of real estate situate in the county of Passaic, in the State of New Jersey, and known, respectively, as the Post farm and the Fredericks farm. And also to a certain parcel of land lying west of the Bergen Tunnel, in Hudson County, State of New
63 Jersey, known as the Laundry property. And also all other real estate of the railroad company situate in the State of New Jersey of every kind and description and wherever in the said State the same may be situate. Also a tract of land, being about four acres, situate in the township of Texas, county of Wayne, in the State of Pennsylvania.

And also all the estate, right, title, and interest of the railroad company of, in, and to certain piers, bulkheads, and water fronts in the said city of New York, that is to say: Piers 29, 30, 31, and 32, North

River, with bulkheads between piers 30 and 31, 31 and 32, and half the bulkhead between piers 32 and 33; also the pier at the foot of West Twenty-third street, and the bulkhead between Twenty-second and Twenty-third streets; also the piers 7 and 8, East River, and the bulkhead between them.

And, also, all tracts of land or interest therein of the railroad company lying and being in the following States and counties, namely: counties of Rockland, Orange, Sullivan, Delaware, Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Genesse, Erie, Niagara, Cattaraugus, Chautauqua, and Monroe, in the State of New York; counties of Hudson, Essex, Bergen, and Passaic, in the State of New Jersey; counties of Susquehanna, Jefferson, Pike, and McKean, in the State of Pennsylvania.

Also all the right, title, and interest of every name and nature hereafter acquired by the railroad company in or to the property, railroad, and franchises now of the New York, Pennsylvania and Ohio Railroad Company, or any branch, extension, or leased or operated line thereof or therefrom (except certain lands and interests in lands not immediately appurtenant to said railroad, of which lands and interests the description is on file in the possession of the party of the second part) or in any bonds, stocks, or other security of such railroad company, or of any successor company or companies, subject to the terms upon which any such acquisition may have been
64 made; provided, however, that nothing herein is intended or shall be construed to affect or limit the reserved right of the railroad company at its option to modify from time to time or to elect not to continue the agreement dated November 18th, 1895, under which it is now operating the said New York, Pennsylvania and Ohio Railroad.

Also, all the right, title estate, interest, property, and franchises of the railroad company of, in, and to any and all other lines of railway, extension, and branches now owned, leased, or held by the railroad company or in which it has any interest whatsoever, wherever located, notwithstanding the same may not be particularly set forth or described in this indenture.

Also, all the right, title, estate, interest, and property of the railroad company in and to any and all lines of railway, extensions, and branches, including the franchises appurtenant thereto, and any and all bonds, stocks, and other property of every kind or description (notwithstanding that the same are not now particularly set forth in this indenture), which, from time to time, in the manner hereinafter provided, shall be designated in the verified certificates to be furnished by the railroad company to the trustee whenever it shall make any call for any of the $5,000,000 "prior lien bonds" reserved under the provisions of this indenture for enlargement and improvement of terminal facilities, including elevation of tracks at Jersey City, Buffalo, and elsewhere, additional wharf facilities at New York, reducing grades, constructing double track, and purchasing additional equip-

ment; or whenever it shall make any call for any of the $17,000,000 "general lien bonds" reserved under the provisions of this indenture for construction, equipment, additions to or improvements or purchases of property; and also any and all franchises and rights
65 of any kind relating to any and all lines of railway, extensions, branches, and other property constructed or acquired from the use of any such prior lien bonds or general lien bonds or their proceeds.

Including any and all roadbed, superstructure, rights of way, rails, tracks, sidetracks, bridges, viaducts, buildings, depots, stations, warehouses, carhouses, enginehouses, freighthouses, woodhouses, machine shops and other shops, turntables, waterstations, fences, docks, structures, erections and fixtures, and all other things of whatever kind in anywise or at any time belonging or appertaining to any and every line of railway at any time subject to the lien of this indenture, or to any branch or operated line thereof, or provided for use thereon, or in connection therewith; and any and all lands designed for depots, warehouses, or other structures at any terminus, or on or along such lines of railway, or upon or along any such branch or operated line; and any and all locomotives, engines, cars, and other rolling stock, equipment, machinery, instruments, tools, implements, materials, furniture, and other chattels now or hereafter acquired or provided for use upon such lines of railway or branches, or upon any other line or branch, or upon any operated line; and any and all leaseholds, leases, rights under lease, or contract, covenants, and agreements, terms or parts of terms; and any and all property, real or personal, of every kind and description, now or hereafter acquired for use upon, or in connection with, or for the purpose of, such lines of railway, or any such branch, or operated line; and any and all corporate rights, privileges, and franchises which the railroad company now has, or hereafter can or shall acquire, possess, or exercise in, to, upon, or in any respect of such lines of railway or branches or any operated line, or any part thereof, necessary for, or appertaining to, the construction, maintenance, or operation of such lines of railway or any such branch or operated line, or any part thereof; and any and all
66 the rents, issues, profits, tolls, and other income of such lines of railway, and of any and all branches and operated lines; and also any and all the rights, privileges, franchises, properties, real or personal, rights, and things which the railroad company may or shall hereafter possess, or become entitled to possess, for the purposes of, or in connection with, such lines of railway or any such branch or operated line.

Together with all and singular the franchises, rights, and privileges now or hereafter appurtenant to, or used in connection with, the lines of railway above mentioned, or any branch or operated line thereof.

Also the following shares of stock, to be transferred to the trustee as hereinafter provided:

67 Name of company.	Par value per share.	Number of shares.
Buffalo, New York and Erie Railroad Company	$100	8,238
Jefferson Railroad Company	50	41,909
Buffalo, Bradford and Pittsburgh Railroad Company	100	21,899
Bergen County Railroad Company	100	2,000
Middletown and Crawford Railroad Company	50	1,600
Newark and Hudson Railroad Company	100	2,500
Paterson, Newark and New York Railroad Company	50	5,000
Bergen and Dundee Railroad Company	100	400
Long Dock Company	100	8,000
New York, Lake Erie and Western Docks and Improvement Company	100	6,040
Suspension Bridge and Erie Junction Railroad Company	100	4,992
Buffalo Creek Railroad Company	100	1,250
Chicago and Erie Railroad Company	100	1,000
Pavonia Ferry Company	100	1,000
Hillside Coal and Iron Company	100	10,000
Northwestern Mining and Exchange Company	100	5,000
Blossburg Coal Company	100	10,000
Tioga Railroad Company, preferred stock	50	3,794
Tioga Railroad Company, common stock	50	7,818
Elmira State Line Railroad Company	100	610
Arnot and Pine Creek Railroad Company	100	2,550
Union Steamboat Company	100	10,000
Union Dry Dock Company	500	300
Conesus Lake Railroad Company	50	375

Also the following bonds, to be delivered to the trustee as hereinafter provided:

$185,000 bonds of the Buffalo, Bradford and Pittsburgh Railroad Company, secured by its mortgage dated January 1st, 1865, to Dorman B. Eaton, as trustee.

68 $57,200 bonds of the Middletown and Crawford Railroad Company, secured by its mortgage dated April 1st, 1871, to Jonathan M. Matthews, Ambrose S. Murray, and Alexander Crawford, as trustees.

$250,000 bonds of the Newark and Hudson Railroad Company, secured by its mortgage dated September 20th, 1871, to H. N. Otis, as trustee.

$499,000 bonds of the Paterson and Newark Railroad Company, secured by its mortgage dated January 1st, 1868, to W. C. Rushmore and C. Walsh, as trustees.

$604,000 bonds of the New York, Lake Erie and Western Docks and Improvement Company, secured by its mortgage dated June 1st, 1883, to the Farmers' Loan and Trust Company, as trustee, as modified by the supplemental contract dated

$1,900,000 bonds of the New York, Lake Erie and Western Coal and Railroad Company, secured by its mortgage dated May 15th, 1882, to the Metropolitan Trust Company of the city of New York and J. Lowber Welsh, of the city of Philadelphia, as trustees.

$35,000 bonds of the Suspension Bridge and Erie Junction Railroad Company, secured by its mortgage dated June 1st, 1870, to Horatio N. Otis, as trustee.

$9,776,000 income bonds of the Chicago and Erie Railroad Company, secured by its mortgage dated August 21st, 1890, to New York Security and Trust Company and John B. Elam, as trustees.

Also, all property of every name and nature, from time to time hereafter, by delivery or by writing of any kind, for the purposes hereof, pledged, assigned, or transferred by the railroad company or any one in its behalf to the trustee, which is hereby authorized to receive any property, at any and all times, as and for additional security, and also, when and as hereinafter provided, as substituted
69 security for the payment of bonds issued or to be issued hereunder, and to hold and apply any and all such property subject to the terms hereof.

It being intended to include within the grant of this indenture all lines of railway, extensions, branches, real estate, and railroad property conveyed to or acquired by, or for the benefit of, the railroad company, party of the first part hereto, under or in pursuance of the decree confirming the sale, and the deeds of the special master and others executed or to be executed pursuant to such decree, in the suit of Trenor Luther Park against the New York, Lake Erie and Western Railroad Company and the Farmers' Loan and Trust Company; the Farmers' Loan and Trust Company against the New York, Lake Erie and Western Railroad Company and Trenor Luther Park; consolidated cause, in equity, in the Circuit Court of the United States for the Eastern District of New York, and in the various decrees ancillary thereto, wherein also foreclosure was had of the second consolidated mortgage made by the New York, Lake Erie and Western Railroad Company, dated October 5th, 1878, to the Farmers' Loan and Trust Company of New York, trustee.

To have and to hold the premises, railroads, properties, real or personal, rights, franchises, estates, appurtenances, stock, and bonds hereby conveyed and assigned, or intended to be conveyed or assigned, unto the trustee, its successor or successors and assigns forever:

But in trust, nevertheless, as to each of the said two issues of bonds, respectively, viz, primarily the $35,000,000 "prior lien bonds" as one issue, and secondarily the $140,000,000 "general lien bonds," as a separate, subordinate, and subject issue, for the equal, proper, and proportionate benefit and security severally and respectively of all and every the present and future holders, first of any and every
70 "prior lien bond," and, second, and subject thereto, of any and every "general lien bond" issued under and secured by this indenture, as well all those now issued as all hereafter issued in addition thereto or by way of substitution or exchange, in accordance with the terms of this indenture, and for enforcing payment thereof when payable, in accordance with the true intent and meaning of the stipulations of this indenture and of the said bonds and interest obligations, respectively, so that the "prior lien bonds," without regard of time of actual issue, shall have priority and preference, as to both principal and interest, over the "general lien bonds," and that the general lien bonds shall all be subject to the prior and superior lien of the prior lien bonds; but without preference, priority, or distinction, as to lien or otherwise, of any one bond of either of such two issues over any other bond of the same issue, by reason of priority in

the execution, delivery, or negotiation thereof, and so that each and every bond of either of such two issues, issued and to be issued as aforesaid, shall have, under and by this indenture, the same right, lien, and privilege as every other bond of that issue, and the principal and interest of every such bond of either issue shall, subject to the terms hereof, be secured hereby equally and proportionately with every other bond of that issue, as though all had been made, executed, delivered, and negotiated simultaneously with the execution and delivery of this indenture; it being intended that the lien and security of all such bonds shall take effect from the day of the date of this indenture, without regard to the date of actual issue, sale, or disposition thereof; and so that the lien and security of this indenture, and of all bonds issued hereunder, shall take effect from the day of the date hereof as though upon such day actually issued, sold, and delivered to, and in the hands of, innocent holders for value.

71 And it is hereby expressly covenanted that all such bonds and the coupons for interest thereon are to be issued, certified, delivered, received, and negotiated, and that the mortgaged properties and franchises are to be held by the trustee subject to the following further covenants, conditions, and provisions, viz:

ARTICLE ONE.

All bonds hereby secured shall, from time to time, by the railroad company be executed and delivered for certification to the trustee, which shall thereupon certify and deliver the same as provided in this article. Only such bonds as shall bear the trustee's certificate duly endorsed thereon and duly signed shall be secured by this indenture or shall be entitled to any lien or benefit hereunder; and every such certificate of the trustee upon any bond executed in behalf of the railroad company shall be conclusive evidence that the bond so certified has been duly issued hereunder and is entitled to the benefit of the trust hereby created. Such certificates may be made and bonds may be delivered hereunder in advance of registration or record of this indenture.

The bonds and certificates for shares hereby pledged as specifically enumerated in the granting clauses hereof shall, prior to the certification of any bonds hereunder, be assigned and delivered to the Farmers' Loan and Trust Company, trustee under this indenture.

Before certifying or delivering any coupon bond, the trustee shall cut off and cancel all coupons thereof then matured; and the trustee shall not certify or deliver any registered bond bearing interest from any date more than six months prior to such certification or delivery.

72 A.

Of the bonds authorized to be issued under and secured by this indenture thirty-five million dollars ($35,000,000) shall be prior lien bonds.

SECTION 1. Of the prior lien bonds authorized to be issued under and secured by this indenture, bonds to the amount of fifteen million six hundred thousand dollars ($15,600,000) shall be certified by the trustee, and upon a resolution of the board of directors of the railroad company shall be delivered to Charles H. Coster, Louis Fitzgerald, and Anthony J. Thomas, or their survivors or successors, the committee named in the certificate of incorporation of the railroad company, immediately upon the execution and delivery hereof, or as soon as may be thereafter.

SEC. 2. Out of and from the remainder of such authorized issue of prior lien bonds there shall be reserved, not immediately to be executed or certified by the trustee, bonds to the amount of fourteen million four hundred thousand dollars ($14,400,000).

Said fourteen million four hundred thousand dollars ($14,400,000) of such prior lien bonds shall be certified by the trustee and delivered to the railroad company, from time to time hereafter, as and when called for by resolution of the board of directors of the railroad company, stating, in effect, that the same are to be used from time to time to acquire railroad and railroad equipment, now of the New York, Pennsylvania and Ohio Railroad Company (substantially as covered by its so-called "first mortgage of May 6, 1880," to the Farmers' Loan and Trust Company, trustee), subject to "prior lien" bonds of said New York, Pennsylvania and Ohio Railroad Company, equipment obligations and rentals now resting thereon, or to acquire securities of the New York, Pennsylvania and Ohio Railroad Company, or of a successor company or companies, in amounts and
73 to an extent which in the opinion of the board of directors of the railroad company shall give to the railroad company, or enable it to acquire, satisfactory control of the operation and management of said railroad.

If said prior lien bonds hereby secured shall be used to acquire securities of the New York, Pennsylvania and Ohio Railroad Company, the trustee shall certify and deliver said $14,400,000 of prior lien bonds hereby secured from time to time only at the rate of one thousand dollars par value of such prior lien bonds for each five thousand dollars par value of said so-called first mortgage bonds, which shall be acquired and pledged hereunder. If securities of a succesor company or companies shall be acquired, then the trustee shall reserve out of said $14,400,000 of prior lien bonds hereby secured, an amount equal at par to the aggregate amount of all the secured and unsecured indebtedness of such successor company or companies that shall not be acquired and pledged hereunder, other than the said New York, Pennsylvania and Ohio prior lien bonds and equipment obligations and liens upon or for the benefit of properties leased or controlled by said New York, Pennsylvania and Ohio Railroad Company and ordinary operating accounts; and the bonds so reserved shall from time to time be certified and delivered by the trustee when and as a like amount of such secured or unsecured in-

debtedness shall be discharged or acquired by the railroad company, and assigned to the trustee hereunder.

As to the existence and amount of any such secured or unsecured indebtedness of a successor corporation, the written opinion of the counsel of the railroad company shall, according to its terms and to any action pursuant thereto, be sufficient evidence and authority to the trustee.

When delivering any bonds under this section the trustee shall require either the immediate subjection of the property acquired to the lien hereof (excepting, however, certain lands and interests
74 in lands of the New York, Pennsylvania, and Ohio Railroad Company hereinbefore mentioned), or, if this be not reasonably practicable, shall deliver the bonds upon such trusts as are, in its judgment, calculated to accomplish such subjection within a reasonable period, but the trustee shall not be liable for any error of judgment in this respect.

SEC. 3. Out of the remainder of such authorized issue of prior lien bonds there shall be reserved, not immediately to be executed or certified by the trustee, bonds to the amount of five million dollars ($5,000,000).

Said five million dollars of such prior lien bonds shall be certified by the trustee and delivered to the railroad company from time to time hereafter, when and as called for by resolution of the board of directors to the effect that the bonds so called for and their proceeds are to be used, upon lines or property now or hereafter owned by the railroad company, and subject to the lien of this indenture or upon lines or property of any company of which a majority of the capital stock shall be subjected to the lien of this indenture, only for the following purposes, or some one or more of them, viz: (1) Enlargement and improvement of terminal facilities, including elevation of tracks or other improvement of crossings at Jersey City, Buffalo, and elsewhere; (2) additional wharf facilities at New York or Jersey City; (3) purchasing additional equipment; (4) reducing grades and constructing double track, or to reimburse the railroad company for outlays made subsequent to the date hereof for the purposes aforesaid or some one or more of them.

At any time or times, upon any such resolution, and with the written consent of the voting trustees (under the voting trust authorized in the certificate of incorporation of the railroad company), or the greater number of those then acting as such voting trustees, such prior lien bonds shall be so delivered to the amount specified in every such resolution, not in any one instance exceeding $1,000,000,
75 but, in every instance after the first delivery of such bonds, before delivering any additional amount of such bonds, the trustee shall require the railroad company to furnish, in addition to such resolution of the board, the verified certificate or certificates of some person or persons cognizant of the facts, stating

(a) That all such bonds and the proceeds of all such bonds certified and delivered on or subsequent to the rate of the last preceding reso-

lution, or resolution and verified certificate, as the case may be, have been used for such purposes, or for some one or more of them, or to reimburse the railroad company as above provided;

(b) The amount of such bonds so certified and delivered, which, or the proceeds of which, on or subsequently to the date of the last preceding resolution, or resolution and verified certificate (as the case may be), shall have been actually used for any such purpose, or to reimburse the railroad company, as above provided, and specifically indicating each and every such acquisition or construction, and also stating in detail the amount of bonds, or proceeds of bonds, used or expended for each and every such purpose.

(c) That the price paid in bonds or their proceeds for such construction or acquisition was not in excess of the fair value of the work done or property acquired, and that the bonds included in such verified certificate were sold, disposed of, or otherwise accounted for, at not less than their fair market value at the time of such sale, disposition, or accounting.

(d) That of the expenditures for which such certificates shall state that prior lien bonds or their proceeds have been used, no part has been provided by the use of general lien bonds; and that of the expenditures for which reimbursement shall be claimed, no part has been obtained by the railorad company out of the general lien bonds or their proceeds.

Every such verified certificate shall be accompanied by the written statement of the president or one of the vice-presidents, and of
76 the auditor or treasurer of the railroad company that they believe such certificate to be true, and that such bonds have been used and the expenditures therein certified have been made only for purposes properly chargeable to capital account of the railroad company, and that no part thereof has been used for ordinary maintenance of the lines of railway or other property owned or in any way controlled by the railroad company or for replacements or other purposes ordinarily treated by railroad companies as a part of their operating expenses.

Such written consent of voting trustees, resolutions, statements, and verified certificates shall be deemed and taken as plenary authority to the said trustee for its certification of such prior lien bonds or of any one or more of them.

B.

Of the bonds authorized to be issued under and secured by this indenture, one hundred and forty million dollars ($140,000,000) shall be general lien bonds.

SEC. 4. Of the general lien bonds authorized to be issued under and secured by this indenture, bonds to the amount of thirty million nine hundred and twenty-seven thousand dollars ($30,927,000) shall be certified by the trustee and shall be delivered to Charles H. Coster, Louis Fitzgerald, and Anthony J. Thomas, or their survivors or successors, the committee named in the certificate of incorporation of the

railroad company, immediately upon the execution and delivery of this indenture, or as soon as may be thereafter.

SEC. 5. Out of and from the remainder of such authorized issue of general lien bonds there shall be reserved, not immediately to be executed or certified by the trustee, bonds to the amount of seventy-nine million nine hundred and eighteen thousand dollars ($79,-
918,000), for the purpose of providing for the purchase, re-
77 demption, and acquisition by the trustee, as hereinafter provided, of bonds secured by the thirty-six following mortgages (such mortgages being stated and described with substantial accuracy and as generally known):

I.

The first mortgage or charge created by an act of the legislature of the State of New York, passed May 14, 1845, entitled "An act in relation to the construction of the New York and Erie Railroad," to secure an issue of bonds of said New York and Erie Railroad Company, bearing interest at the rate of seven per cent per annum and payable on July 1st, 1867, which bonds have been duly extended until May 1, 1897, at interest at the rate of 7 per cent per annum, and of which $2,482,000 are now outstanding and unpaid.

The second mortgage made by said New York and Erie Railroad Company, dated March 1, 1849, to secure an issue of bonds of said company bearing interest at the rate of 7 per cent per annum and payable March 1, 1859; which bonds have been duly extended until September 1, 1919, at interest at the rate of 5 per cent per annum, payable in gold, and of which $2,149,000 are now outstanding and unpaid.

The third mortgage made by said New York and Erie Railroad Company, dated March 1, 1853, to secure an issue of bonds of said company bearing interest at the rate of 7 per cent per annum and payable on March 1, 1883, which bonds have been duly extended until March 1, 1923, at interest at the rate of 4½ per cent per annum, payable in gold, and of which $4,617,000 are now outstanding and unpaid.

The fourth mortgage made by said New York and Erie Railroad Company, dated August 15, 1857, to secure an issue of bonds of said company bearing interest at the rate of 7 per cent per annum and payable on October 1, 1880, which bonds have been duly extended until October 1, 1920, at interest at the rate of 5 per cent per annum, payable in gold, and of which $2,926,000 are now outstanding and unpaid.

The fifth mortgage made by said New York and Erie Railroad Company, dated June 1, 1858, to secure an issue of bonds of said company bearing interest at the rate of 7 per cent per annum and payable on June 1, 1888, which bonds have been duly extended until June 1, 1928, at interest at the rate of 4 per cent per annum, payable in gold, and of which $709,500 are now outstanding and unpaid.

The mortgage made by the Buffalo branch of the Erie Railway and the Erie Railway Company, dated July 1, 1861, to secure a certain issue of bonds bearing interest at the rate of 7 per cent
78 per annum and payable on July 1, 1891, which bonds have been duly extended until July 1, 1931, at interest at the rate of 4 per cent per annum, payable in gold, and of which $182,600 are now standing and unpaid.

The mortgage made by said Erie Railway Company, dated September 1, 1870, to secure a certain issue of its bonds (commonly called "First consolidated mortgage bonds"), bearing interest at the rate of 7 per cent per annum and payable September 1, 1920, and of which $16,891,000 are now outstanding and unpaid.

Also, $3,705,977.10 first consolidated mortgage funded coupon bonds of the New York, Lake Erie and Western Railroad Company, dated September 1st, 1878, bearing interest at the rate of 7 per cent per annum, payable September 1st, 1920, and secured by a pledge of coupons for interest on the first consolidated mortgage bonds of the Erie Railway Company, all of which are now outstanding and unpaid.

The mortgage made by the Newburgh & New York Railroad Company, dated August 1st, 1868, to Jay Gould, as trustee, to secure an issue of bonds of said company and payable January 1st, 1889, which bonds have been duly extended until January 1, 1929, with interest at the rate of 5 per cent per annum in gold, and of which $250,000 are now outstanding and unpaid.

The mortgage made by the Buffalo and Southwestern Railroad Company, dated December 17, 1877, to Elbridge G. Spaulding, as trustee, to secure an issue of bonds of said company, bearing interest at the rate of 6% per annum, payable December 1, 1907, of which $1,500,000 are now outstanding and unpaid.

The mortgage made by the Lockport and Buffalo Railroad Company, dated October 1st, 1877, to Matthias H. Arnot, as trustee, to secure bonds bearing interest at 7% per annum, and due October 1st, 1897, of which $140,000 are now outstanding and unpaid.

II.

The mortgage made by the Long Dock Company, dated November 16, 1885, to Anthony J. Thomas and Charles Edward Tracy, as trustees, to secure an issue of gold bonds of said company, bearing interest at the rate of 6% per annum and payable October 1, 1935, of which $7,500,000 are now outstanding and unpaid.

The mortgage made by the Jefferson Railroad Company, dated January 1st, 1889, to the Fidelity Insurance, Trust and Safe Deposit Company, as trustee, to secure an issue of gold bonds of said company, bearing interest at the rate of 5% per annum and payable January 1, 1909, of which $2,800,000 are now outstanding and unpaid.
79 The mortgage made the Jefferson Railroad Company on its Honesdale Branch, dated July 1st, 1867, to John Torrey, Z. H.

Russell, and Coe F. Young, as trustees, to secure an issue of bonds of said company, payable July 1, 1927, of which $204,000, bearing interest at 4½% per annum, are now outstanding and unpaid.

Th mortgage made by the Jefferson Railroad Company on its Honesdale Branch, dated January 1st, 1869, to John Torrey, Z. H. Russell, and Coe F. Young, as trustees, to secure an issue of bonds of said company, payable July 1st, 1927, and bearing interest at the rate of 6% per annum, of which $96,000 are now outstanding and unpaid.

The mortgage made by the Buffalo, Bradford, and Pittsburgh Railroad Company, dated January 1st., 1865, to Dorman B. Eaton, as trustee, to secure an issue of gold bonds of said company, bearing interest at the rate of 7% per annum, and payable January 1, 1896, which bonds other than those pledged hereunder are now outstanding and unpaid to the amount of $395,000.

The mortgage made by the Bergen County Railroad, dated March 1st, 1881, to the Farmers' Loan and Trust Company, ing interest at the rate of 6% per annum and payable April 1, 1911, of which $200,000 are now outstanding and unpaid.

The mortgage made by the New York, Lake Erie and Western Coal & Railroad Company, dated May 15, 1882, to the Metropolitan Trust Company of New York and John Lowber Welsh, of the city of Philadelphia, as trustees, to secure an issue of gold bonds of said company, bearing interest at the rate of 6% per annum, and payable May 1, 1922, which bonds, other than those pledged hereunder, are now outstanding and unpaid to the amount of $1,100,000.

as trustee, to secure an issue of bonds of said company bear-

The mortgage made by the New York, Lake Erie and Western Docks & Improvement Company, dated June 1, 1883, to the Farmers' Loan & Trust Company, trustee, as modified by the supplemental contract dated February 8th, 1890, to secure an issue of bonds of said company, bearing interest at the rate of 6% per annum, and payable July 1, 1913, which bonds, other than those pledged hereunder, are now outstanding and unpaid to the amount of $3,396,000.

The mortgage made by the Suspension Bridge and Erie Junction Railroad Company, dated July 1st, 1870, to Horatio N. Otis, as trustee, to secure an issue of bonds of said company, bearing interest at the rate of 7% per annum, and payable July 1, 1900, of which bonds, other than those pledged hereunder, $965,000 are now outstanding and unpaid.

The mortgage made by the Tioga Railroad Company, dated April 24th, 1852, to Theodore Dehon, Alfred S. Fraser, and Watts Sherman, as trustees, to secure an issue of bonds of said company, bearing interest at the rate of 5% per annum, and payable November 1, 1915, of which $239,500 are now outstanding and unpaid.

The mortgage made by the Tioga Railroad Company, dated October 1st, 1875, to George M. Diven, as trustee, to secure an issue of bonds of said company, bearing interest at the rate of 7% per annum, and

payable October 1, 1905, of which $265,000 are now outstanding and unpaid.

Th mortgage made by the Tioga Railroad Company, dated November 1st, 1876, to Myron P. Bush, as trustee, to secure an issue of bonds of said company, bearing interest at the rate of 7% per annum and payable November 1st, 1896, of which $125,000 are now outstanding and unpaid.

The mortgage made by the Elmira and State Line Railroad Company, dated October 1st, 1875, to Matthias H. Arnot, as trustee, to secure an issue of bonds of said company, bearing interest at the rate of 7% per annum, and payable October 1, 1905, of which $160,000 are now outstanding and unpaid.

The mortgage made by the Chicago and Atlantic Railroad Company, dated November 1st, 1888, to Central Trust Company of New York, as trustee, to secure an issue of bonds of said company, known as "terminal bonds," bearing interest at the rate of 5% per annum, and payable July 1, 1918, of which $300,000 are now outstanding and unpaid.

The mortgage made by the Chicago and Erie Railroad Company, dated August 21st, 1890, to the Central Trust Company of New York and Edward Daniels, as trustees, to secure an issue of bonds of said company bearing interest at the rate of 5% per annum, and payable May 1, 1982, of which $12,000,000 are now outstanding and unpaid.

The mortgage made by the Blossburg Coal Company, dated January 1st, 1878, to Amaziah S. Kendall, as trustee, to secure an issue of bonds of said company, payable January 1st, 1893, which bonds have been duly extended until November 1, 1915, with interest at the rate of 5% per annum, payable in gold, and of which $400,000 are now outstanding and unpaid.

The mortgage made by the Buffalo, New York and Erie Railroad Company, dated June 1st, 1876, to John A. C. Gray, as trustee, to secure bonds, bearing interest at 7% per annum, due June 1, 1916, of which $2,380,000 are now outstanding and unpaid.

III.

The mortgage made by the Montgomery and Erie Railroad Company, dated May 1st, 1866, to William Murray, Nathan C. Sanford, and Henry Merriam, as trustees, to secure bonds bearing interest at 5% per annum and due May 1st, 1926, of which $130,000 are now outstanding and unpaid.

81 The mortgage made by the Montgomery and Erie Railroad Company, dated October 1st, 1867, to John M. Quackenbos and Bartow Wright, as trustee, to secure bonds bearing interest at 5% per annum, and due October 1st, 1927, of which $40,500 are now outstanding and unpaid.

The mortgage made by the Goshen and Deckertown Railroad Company, dated July 1st, 1868, to Ambrose S. Murray, Robert H. Berdell,

and John Stewart, as trustees, to secure bonds bearing interest at 6% per annum, due July 1, 1928, of which $186,500 are now outstanding and unpaid.

The mortgage made by the Goshen and Deckertown Railroad Company, dated November 1st, 1869, to Ambrose S. Murray and Robert H. Berdell and John Stewart, as trustees, to secure bonds bearing interest at 6% per annum, due November 1, 1929, of which $60,000 are now outstanding and unpaid.

The mortgage made by the Middletown and Crawford Railroad Company, dated April 1st, 1871, to Jonathan M. Matthews, Ambrose S. Murray, and Alexander Crawford, as trustees, to secure bonds bearing interest at 4½% per annum, due April 1, 1921, of which, bonds, other than those pledged hereunder, are now outstanding and unpaid to the amount of $8,800.

IV.

The mortgage made by the New York, Pennsylvania and Ohio Railroad Company, dated May 5, 1880, to the Farmers' Loan and Trust Compay, as trustee, to secure an issue of gold bonds of said company, payable March 1st, 1895, which bonds have been duly extended to March 1st, 1935, at 4½% per annum interest, and of which $8,000,000 are now outstanding and unpaid.

V.

The mortgage made by the Cleveland and Mahoning Valley Railroad Company, dated January 1st, 1888, to Central Trust Company of New York, as trustee, to secure an issue of $3,000,000 bonds of said company, bearing interest at the rate of 5% per annum, and payable January 1st, 1938, and now or hereafter outstanding and unpaid.

The mortgage made by the Sharon Railway Company, dated June 1st, 1889, to Farmers' Loan and Trust Company, as trustee, to secure an issue of bonds of said company, bearing interest at the rate of 4½% per annum, payable June 1st, 1919, of which $164,000 are now outstanding and unpaid.

82 The mortgage made by the Newcastle and Shenango Valley Railroad Company, dated July 1st, 1887, to the Farmers' Loan and Trust Company, as trustee, to secure an issue of bonds of said company, bearing interest at the rate of 6% per annum, and payable July 1st, 1917, of which $250,000 are now outstanding and unpaid.

SEC. 6. The said $79,918,000 general lien bonds hereby secured and reserved for the redemption, purchase or acquisition of a like amount of bonds (hereinafter called "old bonds") severally and respectively secured by the mortgages mentioned in the last above section, shall from time to time be issued, certified, and delivered when authorized

by resolution of the board of directors of railroad company only as follows, viz:

(a) Whenever and as often as the railroad company shall tender or cause to be tendered any such old bonds, or bonds issued in exchange therefor under the provisions of article two, section 2 hereof, together, in either case, with all unmatured interest obligations thereunto belonging, the trustee forthwith shall receive the same, and in exchange therefor shall certify and deliver to the railroad company, or upon its order, a like amount at par of the said bonds hereby secured and reserved.

(b) Whenever and as often as the railroad company, on or after the maturity of any such old bonds, or of bonds issued in exchange therefor, as above, or on or after a date eight months prior to the maturity of such old bonds, or of bonds issued in exchange therefor, as above, shall tender or cause to be tendered cash sufficient to purchase or to pay the same at par (and shall also provide to the satisfaction of the trustee for any interest due upon such bonds or accruing before their maturity), the trustee forthwith shall receive such cash, and in consideration thereof shall certify and deliver to the railroad company or upon its order an equivalent amount at par of the said bonds hereby secured and reserved.

83 All cash so received by the trustee shall be by it held and applied to the purchase at par, or, if such purchase be impracticable, to the payment at par of an equivalent amount of the old bonds, or of bonds issued in exchange therefor, as above, for the purchase or payment of which such cash shall have been deposited.

Each and every old bond, or bond issued in exchange therefor, as above, received by the trustee, shall be by it stamped with words "Not negotiable, but held in trust for the purposes declared in the first consolidated mortgage deed of the Erie Railroad Company, dated December 10th, 1895," and shall be by it held without extinguishment, as additional security for the payment of this mortgage debt until at least ninety-nine per cent of all bonds of the issue of which such bond is one, shall either have been paid and canceled, or shall have been received by the trustee hereunder, whereupon in its discretion it may cancel and surrender to the railroad company all bonds of such issue then in its possession.

Provided, however, that no bond of any of the issues enumerated under II, III, IV, and V, of section 5 of this article shall be canceled, unless or until all of the property mortgaged to secure the issue to which such bond belongs, shall have been lawfully vested free from other incumbrance in the railroad company, its successors or assigns, whereupon such property so mortgaged for such issue of old bonds forthwith, ipso facto, and without further conveyance, shall become and be part of the premises hereby mortgaged, and shall be hereby conveyed, as though herein expressly and specifically conveyed, mortgaged and pledged. Nevertheless, the railroad company, its successors and assigns, may, and shall, execute any and all trans-

fers, assignments or conveyances, from time to time, desired by the trustee in order expressly and specifically to subject to the lien of this indenture any property so acquired. Upon every such conveyance of the property mortgaged for any one of such
84 issues, the trustee may cancel and surrender to the railroad company all of the bonds of such issue then held by it, if not more than one per cent of the total issue shall then remain outstanding and unsatisfied.

If at the time of the maturity of any such bonds, the holder thereof shall decline to sell and to deliver the same at par and accrued interest, but shall require the payment and cancellation thereof, then upon such payment and cancellation the trustee shall certify and deliver to the railroad company, or upon its order, a like amount at par of said bonds reserved hereunder as though said matured bonds had been purchased and had been received by the trustee; but in every such case, if such matured bonds shall be of any one of the issues enumerated in II, III, IV, or V, of section 5 of this article, and the railroad company shall not as above provided have acquired the property mortgaged to secure such bonds, the railroad company shall take and execute and shall cause the company owning such property to take and execute such action, proceedings and instruments as in the opinion of the trustee may reasonably be required to subrogate the trustee to all the claim and security of the holder of such bonds, or else the railroad company shall cause to be issued and deposited with the trustee an amount of renewal or other bonds upon the same property at least equivalent thereto at par.

So long as the railroad company shall not be in any default under this indenture in respect of which some request, proceeding or action herein authorized shall have been made or taken by the trustee or by holders of bonds hereby secured, the trustee shall not collect or be entitled to collect, except with the assent of the railroad company, the interest on any old bond at any time held by it hereunder or on any bond now or hereafter pledged with the trustee under any provision of this indenture. Any sums so collected by it with the assent of the railroad company, unless it shall then be in default as afore-
85 said, shall at once be paid over to the railroad company except as hereinafter expressly otherwise provided.

The railroad company shall provide and maintain books wherein it shall register as the property of the trustee all such old bonds received by the trustee; and except as herein expressly provided no such old bond shall be canceled, unless the holder thereof, at time of maturity, shall require cancellation as a condition of surrender.

SEC. 7. Out of the remainder of the authorized issue hereunder, there shall be reserved, to be executed and to be certified by the trustee, not immediately, but from time to time only when and as called for by resolutions of the board of directors to the effect that the bonds so called for and their proceeds are to be used for such purpose, bonds to the amount of eight million and sixty-three thou-

sand dollars ($8,063,000) for the purchase and acquisition by the railroad company and simultaneous pledge hereunder to the trustee, as hereinafter provided, of valid certificates of shares of stock issued by the following companies (other than the shares of some of such companies deliverable to the trustee at the time of execution hereof), viz:

86 Name of company.	Par.	Shares.	Limit of exchange per share.
Buffalo, New York and Erie Railroad Commpany	$100	700	$150
Montgomery and Erie Railroad Company	10	15,000	7
Goshen and Deckertown Railroad Company	10	9,619	7
Jefferson Railroad Company	50	12	50
Rochester and Genesee Valley Railroad Company	100	4,058	100
Buffalo, Bradford and Pittsburgh Railroad Company	100	965	10
Middletown and Crawford Railroad Company	50	844	10
Suspension Bridge and Erie Junction Railroad Company	100	8	100
Tioga Railroad Company	50	6	10
Elmira State Line Railroad Company	100	292	100
Newcastle and Shenango Valley Railroad Company	50	2,915	5
Sharon Railroad Company	50	9,067	62½
Cleveland and Mahoning Valley Railroad Company	100	30,000	225

From time to time as and when the trustee shall receive from the railroad company any such shares, it shall in exchange therefor and when and as called for by resolution of the board of directors of the railroad company certify and deliver to it bonds reserved under this section in an amount not exceeding the value of such shares then so received at the limit of exchange above stated, which shares shall simultaneously be transferred into the name of the trustee.

Whenever it shall make any delivery of bonds reserved as provided in this section, the trustee shall require and receive from the railroad company in addition to such resolution of the board of directors the affidavit of one of its officers cognizant of the facts, stating the
87 amount in bonds actually requisite for the express purpose of enabling the railroad company to acquire such shares then to be received by the trustee. In no event shall any bonds be delivered by the trustee in excess of the amount so stated; but if such amount be less than that in this section limited as the price of such shares, the surplus so left in possession of the trustee may thereafter be by it certified and delivered to the railroad company when and as necessary to enable it so to acquire other shares above mentioned, at prices exceeding those in this section stated; provided, that such necessity and the reasons therefor shall also be stated in such affidavit of the officer of the railroad company; and that, except as to such surplus bonds, deliveries shall not be made in excess of the limits imposed by this section; and provided further, that the trustee shall not certify or deliver any such bonds in exchange for shares of the Newcastle and Shenango Valley Railroad Company, the Sharon Railroad Company, or the Cleveland and Mahoning Valley Railroad Company, until after the railroad company shall have acquired, as provided in section 2 of this article, the New York, Pennsylvania and Ohio Rail-

road, or the control thereof, and shall have subjected the same to the lien of this indenture.

SEC. 8. Out of the remainder of the authorized issue of general lien bonds hereunder there shall be reserved, to be executed and to be certified by the trustee, not immediately, but from time to time only when and as called for by resolution of the board of directors to the effect that the bonds so called for and their proceeds are to be used for such purpose, bonds to the amount of four million and ninety-two thousand dollars ($4,092,000) for retiring or acquiring, as hereinafter provided, equipment-bonds and equipment-trust certificates, warrants, notes or obligations, which shall mature as hereinafter set forth, and to reimburse the railroad company for such of them as from time to time hereafter it shall acquire.

88

I.

Equipment trust certificates, warrants, notes, and obligations of, or affecting certain equipment formerly of the New York, Lake Erie and Western Railroad Company and now of the Erie Railroad Company, maturing after November 1st, 1898, viz:

Baldwin Locomotive Works	$282,147.72
Car Trust of New York, Series C, D, E, F, and G	1,859,515.00

II.

Equipment trust obligations of and affecting certain equipment of the New York, Pennsylvania and Ohio Railroad Company, viz:

Bonds of the New York, Pennsylvania and Ohio Railroad Company, known as London equipment trust bonds of 1888, of which about £181,400 are now outstanding and unpaid.

Bonds of the New York, Pennsylvania and Ohio Railroad Company, known as equipment trust bonds of 1890, of which about £208,600 are now outstanding and unpaid.

In determining the value of sterling bonds, the trustee shall treat one pound sterling as the equivalent of five dollars.

From time to time, and only when and as the trustee shall receive from the railroad company, in addition to such resolution of the board of directors, the certificate of its president or one of its vice-presidents and of its treasurer or auditor, and also (if the trustee so desire) any additional evidence necessary to satisfy the trustee (1) that such equipment bonds, certificates, warrants, notes or obligations have been paid to the amount specified in such certificate, and (2) that such payment has not been stated or included in any prior certificate hereunder, the trustee shall certify and, upon the written order of the railroad company, shall deliver such reserved bonds at par to an amount equal to the payment of such outstanding obligations shown to have been made, by such certificate or other evidence, if any, required by the trustee; provided, however, that the trustee
89 shall not certify or deliver any such bonds on account of

"London equipment trust bonds of 1888" or "equipment trust bonds of 1890," until after the railroad company shall have acquired, as provided in section 2 of this article, the New York, Pennsylvania and Ohio Railroad, or the control thereof, and shall have subjected the same to the lien of this indenture.

SEC. 9. Out of the remainder of the authorized issue hereunder, there shall be reserved, to be executed, and to be certified by the trustee, not immediately but only when and as called for by resolution of the board of directors as next hereinafter provided, bonds to the amount of seventeen million dollars ($17,000,000), which from time to time, on and after January 1st, 1898, the trustee shall certify, upon resolutions of the board of directors of the railroad company, stating that such bonds, to the amount stated in such resolutions, or the proceeds thereof, are to be set aside separate and apart from all other assets and funds of the railroad company, and are to be used only for the construction or acquisition of branch lines or extensions subsequent to December 31st, 1897, or for the acquisition of stocks or bonds thereof subsequent to said date; or for the purchase or construction of rolling stock subsequent to said date; or for construction or betterments subsequent to said date, or for purchase of additional property subsequent to said date, all such construction, betterments, or property purchased to be upon, along, or appurtenant to lines of railway of the railroad company at the time of such use subject to the lien of this indenture, or upon, along, or appurtenant to the lines of railway or the terminal properties of some one or more of the companies mentioned in the schedule of stocks in the granting clauses hereof (other than the Buffalo Creek Railroad Company, the Hillside Coal and Iron Company, the Northwestern Mining and Exchange Company, or the Blossburg Coal Company), or of other companies of
90 whose capital stock, at least a majority in amount at the time of such use shall be pledged hereunder; or to reimburse the railroad company for outlays made subsequent to the thirty-first day of December, eighteen hundred and ninety-seven, for the purposes aforesaid or some one or more of them.

From and out of the $17,000,000 general lien bonds reserved under this section, the trustee shall certify and shall deliver to the railroad company, or upon its order, bonds as follows, viz.:

Upon January 1, 1898, or upon any day thereafter, but prior to December 31st, 1898, upon such resolution or resolutions of the board of directors of the railroad company, such amount of such general lien bonds, not exceeding $1,000,000 bonds par value, as specified in such resolution, shall be so certified and delivered.

In each and every calendar year after December 31, 1898, there shall be so certified and delivered such additional amount of such general lien bonds, not exceeding $1,000,000 par value in any calendar year, as from time to time shall be specified in similar resolutions; but in every instance, before certifying and delivering any of the $17,000,000 general lien bonds reserved under this section (except the $1,000,000 deliverable in the year 1898), the trustee shall require the

railroad company to furnish, in addition to such resolution of the board, the verified certificate or certificates of some person or persons cognizant of the facts, stating

(*a*) that all such general lien bonds and the proceeds of all such general lien bonds certified and delivered on or subsequent to the date of the last preceding resolution, or resolution and verified certificate, in respect of general lien bonds, as the case may be, have been used for such purposes, or for some one or more of them, or to reimburse the railroad company as above provided:

(*b*) the amount of such general lien bonds so certified and delivered, which, or the proceeds of which, on or subsequently to
91 the date of such last preceding resolution, or resolution and verified certificate (as the case may be), shall have been actually used for any such purpose, or to reimburse the railroad company, as above provided, and specifically indicating each and every such acquisition or construction of any railroad, track, structure, betterment, rolling stock or other property, and each and every acquisition of the bonds or stock of any company owning or controlling any railroad or other property (which stock shall be acquired only when a majority of the total capital stock of such company can and shall have been or shall be thereby obtained unless such majority shall theretofore have been acquired and pledged hereunder) and also stating in detail the amount of bonds, or proceeds of bonds, and cash used or expended for each and every such purpose;

(c) that the price paid in general lien bonds or their proceeds for such construction or acquisition was not in excess of the fair value of the work done or property acquired, and that the bonds included in such verified certificate were sold, disposed of, or otherwise accounted for, at not less than their fair market value at the time of such sale, disposition, or accounting;

(d) that of the expenditures for which such certificate shall state that general lien bonds or their proceeds have been used, no part has been provided for by the use of prior lien bonds; and that of the expenditures for which reimbursement shall be claimed no part has been obtained by the railroad company out of prior lien bonds or their proceeds.

No new property shall be acquired by the use of any such general lien bonds or their proceeds in any one calendar year upon which property there shall be any lien or charges prior to this indenture (excepting any of the mortgages specified in sections 5 and 8 of this article which may attach thereto and any undetermined liens or charges incidental to construction and ordinary operating accounts) in excess of one million dollars; and, in case of the acquisition here-
under of any new property, every such verified certificate shall
92 further state whether the property so acquired is known or believed to be subject to any lien or charge prior to this indenture (excepting any of the mortgages specified in sections 5 and 8 of this article, and any undetermined liens of charges incidental to construction and ordinary operating accounts), and shall specify the

amount of any such prior lien or charge (other than as aforesaid) known or believed to exist; and in case any bonds or any shares of the capital stock of any other company shall have been acquired by the use of such bonds or their proceeds, every such verified certificate shall state whether the property of such other company whose bonds or stock shall have been so acquired is known or believed to be subject to any lien or charge prior to that securing such bonds of such company, and whether the company, whose capital stock shall have been so acquired, is known or believed to be indebted (except to the railroad company) in any amount (except for ordinary operating accounts) and whether its property is known or believed to be subject to any lien, charge, or indebtedness, and in each instance specifying the amount of any such debt, lien, or charge known or believed to exist. In every case of any such lien, charge, or indebtedness (except indebtedness to the railroad company or undetermined liens or charges incidental to construction or the lien of any of the mortages for which a reservation of bonds is made in sections 5 and 8 of this article or for ordinary operating accounts), and during the continuance of such lien, charge, or indebtedness, the railroad company shall, by appropriate instrument or instruments, reserve out of the $17,000,000 general lien bonds set apart by this section an amount at par equivalent to all such liens, charges, or indebtedness (except as aforesaid) affecting such property hereafter acquired, and the bonds so reserved shall be taken from the $1,000,000 bonds deliverable under this section in such calendar year, or in the next succeeding calendar year, and shall be executed, certified, delivered, and used only for the retirement or acquisition of such liens, charges, or indebtedness
93 in amounts equivalent at least to the par of the bonds delivered therefor, and all the liens, charges, or indebtedness so retired or acquired shall be canceled or held by the trustee as, in its judgment, shall best protect the holders of the bonds hereby secured.

Every such verified certificate shall be accompanied by the written statement of the president or of one of the vice-presidents, and of the auditor or treasurer, of the railroad company that they believe such certificate to be true, and that such bonds have been used and the expenditures therein certified have been made only for purposes properly chargeable to capital account of the railroad company, and that no part thereof has been used for ordinary maintenance of the lines of railway or other property owned or in any way controlled by the railroad company or for replacements or other purposes ordinarily treated by railroad companies as a part of their operating expenses. Together with such statements and verified certificates, there shall be delivered to the trustee certificates for all shares of stock and all bonds so acquired, and such further instruments and conveyances as may be necessary to vest in the trustee all new property so acquired, and, so far as may be, any and all obligations taken up or acquired with, or by, the said bonds or their proceeds; and also the written opinion of counsel for the railroad company to the effect that such instruments and conveyances are sufficient for that purpose, or

that no additional instrument or conveyance is necessary. The certificates for all shares of stock so acquired shall be duly transferred into the name of the trustee, and any bonds so acquired shall, if practicable, be transferred in like manner, or, if not susceptible of such transfer, they shall be plainly endorsed as the property of the trustee hereunder. Such resolutions, statements, verified certificates, and opinion shall be deemed and taken as plenary authority to the said trustee for its certification of such general lien bonds or of any one or more of them.

Except to retire or acquire liens, charges or indebtedness for
94 which bonds so used shall have been reserved as hereinbefore provided, general lien bonds in excess of an aggregate amount of $1,000,000 shall not be issued or certified under this section in any one calendar year; provided, however, and the appropriation of such $17,000,000 bonds in and by this section 9 is in all respects subject to the condition, and it is hereby expressly declared, that if the beforementioned Charles H. Coster, Louis Fitzgerald, and Anthony J. Thomas, jointly but not severally, the survivors or survivor of them, from time to time, on or before January 1, 1898, by writing addressed to the railroad company and to the trustee, shall require the delivery to them jointly, or upon their joint order or orders, of the whole or any part of $2,000,000 of said bonds, the railroad company shall execute, and the trustee shall certify and deliver to them jointly, or upon their joint order or orders, bonds to the amount specified in such several requisitions to an aggregate amount not exceeding $2,000,000 of such bonds; but no such delivery shall impair the preceding provision for delivery of the residue of the $17,000,000 of bonds to the railroad company at various dates subsequent to December 31st, 1897, and shall be in addition to any deliveries under the foregoing provisions of this article.

C.

SEC. 10. The railroad company shall not and will not issue, negotiate, sell, or dispose of any bonds hereunder, in any manner other than in accordance with the provisions of this indenture, and the agreements in that behalf herein contained, and in issuing, selling, negotiating, or otherwise disposing of such bonds, from time to time, it shall and will well and truly apply, or cause to be applied, the same, or the proceeds thereof, to and for purposes herein prescribed, and to and for no other or different purpose.

95 SEC. 11. The railroad company will make all lawful effort to pledge with the trustee hereunder the bonds above specified in section 5, III and V, at the several dates when the same shall respectively mature: provided that it shall not be required to pay more than par for any such bonds.

SEC. 12. Nothing in this indenture expressed or implied is intended, or shall be construed, to confer upon, or to give to, any person or corporation, other than the parties hereto and the holders of bonds issued under and secured by this indenture, any right, remedy, or

claim upon, under, or in respect of this indenture, or any covenant, condition, or stipulation thereof; all its covenants, conditions, and stipulations being intended to be and being for the sole and exclusive benefit of the parties hereto and of the holders of bonds hereby secured.

SEC. 14. Whenever any coupon bond or bonds amounting to $1,000 or to any multiple of $1,000, together with all unmatured coupons thereto belonging, shall be surrendered for exchange for registered bonds without coupons the railroad company shall issue, and the trustee shall thereupon certify and deliver in exchange for such coupon bond or bonds a like amount of registered bonds (without coupons), which registered bonds shall be for $500 or such convenient multiples thereof as the railroad company from time to time may establish, and shall bear interest at the same rate as the coupon bonds surrendered and from the date of the last matured coupon thereof. In every such case the trustee shall forthwith cancel the bond or bonds and coupons surrendered and deliver the same to the railroad company. The interest on such registered bonds without coupons shall be paid only to the several registered holders of such bonds or upon their written orders.

Whenever any such registered bonds shall be surrendered for
96 transfer, the railroad company shall issue, and the trustee shall certify and deliver to the transferee, a like amount of new registered bonds, upon surrender and cancellation of the bond or bonds transferred. For any such transfer of registered bonds without coupons the railroad company, at its option, may make a charge not exceeding one dollar for each new registered bond issued in exchange for any surrendered bond or bonds.

In case any bond issued hereunder shall become mutilated or shall be destroyed, upon the surrender of any such mutilated bond to the trustee, or upon filing with the trustee satisfactory evidence of such destruction, the railroad company upon receiving indemnity satisfactory to it, may, in its discretion, issue, and the trustee, in its discretion, may certify, a new bond, bearing the same serial number in lieu, substitution, or exchange for, and upon cancellation of, the bond so mutilated or in lieu of the bond destroyed.

SEC. 15. Any act or proceeding required or provided by any term of this indenture or of any bond or resolution herein recited to be done or performed by any board or officer of the railroad company shall and may, in event of any change in its existence, be done and performed with like force and effect by the like board or officer of any railroad corporation that shall at the time be lawful sole successor of the railroad company.

ARTICLE TWO.

SECTION 1. The railroad company will well and truly pay and discharge, or will acquire and pledge hereunder, all of the old bonds mentioned in article one, section 5, I, II, and IV, and section 8, I

and II, at or before the several dates of maturity thereof, provided it shall then be lawfully authorized to issue bonds hereunder for that purpose as provided in article one hereof, and it will duly, punctually and regularly pay the interest on all such old bonds until the same shall be paid and discharged or acquired and pledged hereunder, excepting, however, that the payment of the bonds of the New York and Erie Railroad Company, secured by the mortgage or charge created by the act of the legislature of the State of New York passed May 14, 1845, and amounting to the principal sum of $2,482,000 may be extended or renewed by the railroad company at or before maturity without impairment of the lien or the security of said bonds, for any period or periods, at not over four per cent per annum interest, principal and interest payable in gold, and that the lien hereof on the property embraced in the mortgage securing such bonds shall be subordinate to the lien of such bonds as so extended; and excepting further that neither the covenants nor restrictions of this section shall apply in respect of any bonds now or hereafter issued by the New York, Pennsylvania and Ohio Railroad Company, or of any corporation (other than the railroad company) successor to said company, unless or until the railroad now of said company, or securities of said company or of a successor company, shall have been acquired and subjected to the lien hereof pursuant to the provisions of article one, section 2, hereof.

SEC. 2. As and when, but no further than, expressly required by the terms of any of the old mortgages, the railroad company will from time to time cause to be issued thereunder bonds for delivery in exchange for other old bonds for which reservation is made in article one, section 5; but no issue shall be made thereunder that shall increase the aggregate old indebtedness of $79,918,000, or that, except for such exchange, shall increase the indebtedness as stated in said article one, section 5, secured by any one or more of said old mortgages; provided, however, that neither the covenants nor the restrictions of this paragraph shall apply in respect of any bonds now or hereafter issued by any of the companies enumerated in article one, section 5, III and V, unless all the stock of any such company shall have been duly pledged hereunder, and then only in respect of the company of which all the capital stock shall have been so pledged.

SEC. 3. Having possession of the railroad now of the New York, Pennsylvania and Ohio Railroad as aforesaid, or securities therefor acquired and subjected to the lien hereof pursuant to the provisions of article one, section 2, hereof, the railroad company shall not and will not suffer or permit any default permitting any of the several lessors to terminate any of the existing leases of the Cleveland and Mahoning Valley Railroad, the Sharon Railroad, the Westerman Railroad, or the Newcastle and Shenango Valley Railroad, or any lease hereafter made to it, or for its benefit, of any franchises or property now or hereafter belonging to any of the said railroad companies.

In case and whenever it shall make default in paying any sum stipulated to be paid in any such present or future lease of any of the said railroads, the trustee, without affecting any of its rights hereunder, from time to time, in its discretion, may itself pay any sum so in default, and thereupon shall have and forthwith may assert a lien for such advances upon the premises hereby mortgaged and the proceeds thereof, which lien shall be entitled to priority in rank and payment from the income and profits of the mortgaged premises over any bonds hereby secured.

SEC. 4. The railroad company will (excepting as otherwise provided in its Buffalo and Southwestern second lien mortgage in respect of that railroad) duly and punctually pay all lawful claims and demands not hereinbefore enumerated, which, if unpaid, might take precedence over this indenture, and each and every company (except the Buffalo Creek Railroad Company) of whose capital stock the greater part is now pledged hereunder or hereafter shall be acquired and pledged hereunder as provided in section 9 of article one, at all times during the continuance of such pledge will duly and
99 punctually pay all lawful claims and demands, which, if unpaid, might take precedence of any mortgage securing bonds of such company, or which might, in any wise, impair the value of such capital stock of such company if pledged hereunder; and the railroad company will enforce any and all of its claims and demands against any such company only in such manner as not to prejudice or affect the bonds secured by this indenture.

The railroad company will also at all times take all such action as from time to time may be proper to preserve the corporate existence and corporate rights of every company of whose capital stock the greater part shall be pledged hereunder.

SEC. 5. The railroad company shall and will, from time to time pay and discharge all taxes, assessments, and governmental charges lawfully imposed upon the lines of railroad and other premises hereby mortgaged, or upon any part thereof, or upon the income and profits thereof, the lien of which would be prior to the lien hereof, so that the priority of this indenture shall be fully preserved; and if any company of whose capital stock the greater part is now pledged hereunder or hereafter shall be acquired and pledged hereunder as provided in section 9 of article one (excepting the Buffalo Creek Railroad Company or any coal company in respect of lands upon which mining shall have been abandoned) shall, at any time during the continuance of any such pledge, fail to pay all such taxes, assessments and charges lawfully imposed upon the property of such company or upon the income and profits thereof, it will itself pay and discharge the same.

SEC. 6. Except as herein otherwise expressly provided, the railroad company will not sell any bond or share of stock now or hereafter pledged by it under this indenture nor pledge or agree to pledge or hypothecate the same, except subject to the prior lien hereof; it will not by any voluntary act part with the ownership and title of such

bonds or stock, or of any part of such bonds or stock, or its
100 equity of redemption therein or the voting power thereof; it
will, subject to the lien hereof, hold all and singular such stock
(other than the shares of the Buffalo Creek Railroad Company) of
any company of whose capital it may control the major part, and
exercise its voting power thereon in such manner that it shall retain
n itself the rights and powers of a majority shareholder in the
apital stock of every such company; and as such holder of such
tock it will not by affirmative vote, or by abstaining from voting,
anction or permit any increase of the capital stock of any such com-
pany or the creation of any mortgage or other lien upon the railroad
r property of any such company, unless effective provision be made
hat all bonds secured by any such additional mortgage and all addi-
ional shares of such stock (which shares shall be fully paid and
onassessable) shall, at the time of their issue, be delivered and
pledged to the trustee, to be by it held, subject to all the trusts of
his indenture, with the same effect as if such bonds and shares had
een delivered and pledged to it herein and at the time of the making
ereof. This provision, however, shall not apply to any increase of
tock or to the creation of mortgages or other liens by the Buffalo
Creek Railroad Company. But nothing herein contained shall pre-
ent the extension at maturity of any bonds now or hereafter
ledged to or held by the trustee under this indenture, and at the
ime of such pledge secured by any mortgage of any company, or
revent the issue and substitution therefor of other bonds for equiva-
nt amount, adequately secured by similar mortgage; it being dis-
nctly understood that the time for the payment of the principal of
ny bonds so pledged hereunder may, at or before their maturity,
e extended by the railroad company (not then being in default here-
nder), with the consent of the company which, at the time of such
onsent, shall own or control the property upon which such bonds so
to be extended may be a lien, and also that other bonds for an
01 equivalent amount, adequately secured by similar mortgages,
may be issued in substitution therefor, and that in every such
ase such new bonds shall forthwith ipso facto come under the lien
nd grant of this indenture, and shall forthwith be delivered to the
rustee.

ARTICLE THREE.

SECTION 1. The railroad company shall and will well, duly and
unctually pay, or cause to be paid, to every holder of any bond
sued hereunder and secured hereby, the principal and interest ac-
ruing thereon, at the dates and rates and in the manner mentioned
erein, or in the coupons thereto belonging, according to the true
ntent and meaning thereof; without deduction from either principal
interest for any tax or taxes which it may be required to pay or
tain therefrom under or by reason of any present or future law;
d it shall and will pay every such tax. All coupons when paid
all forthwith be cancelled.

SEC. 2. All lines of railway and property of every kind, and all interest therein, when and as and to the extent hereafter acquired, as above provided, out of, or from bonds, or the proceeds of bonds, secured by this indenture, or otherwise pursuant to the provisions hereof, shall, without any further conveyance or assignment, immediately upon such acquisition, and subject to the terms and conditions of such acquisition, become and be subject to the lien of this indenture as fully and completely as though now owned by the railroad company, and expressly and specifically conveyed by, and embraced in, the granting clauses of this indenture; and the railroad company at all times will execute and deliver any and all such further assurances or conveyances as the trustee may reasonably direct or require, for the purpose of expressly and specifically subjecting the same to the lien of this indenture.

102 SEC. 3. Upon demand of the trustee from time to time the railroad company will grant, convey, confirm, assign, transfer, and set over unto the trustee all real and personal estate, corporate rights and franchises which in any way or manner it shall acquire as appurtenant to, or in, or for use upon, or for the business of, any railroad hereby mortgaged, or as appurtenant to, or in, or for use upon, or for the business of, any leasehold estate hereby mortgaged (including all railroads and leasehold estates which shall hereafter become subject to the lien of this mortgage), or of any railroad of which any stocks or bonds are or shall be pledged hereunder; and it shall and will also make, do, seal, execute, acknowledge, and deliver, or cause to be made, done, sealed, executed, acknowledged, and delivered all and every such further acts, matters, things, deeds, conveyances, bills of sales and transfers, and assurances in the law, for the better assuring, conveying, and confirming unto the trustee all and singular the hereditaments and premises, estates, and property hereby conveyed, or intended so to be, or which are hereby covenanted and agreed hereafter to be conveyed to the trustee, as it, or its counsel learned in the law, shall reasonably require for better effectuating and carrying out the provisions, objects, and purposes of this indenture, and for securing payment of the principal and interest of the bonds intended to be hereby secured; all which estates shall be held by the trustee in, under and upon the trusts, and for the uses and purposes, and subject to the powers herein mentioned, declared, given, implied, or expressed; and, it will endeavor to procure from all companies, of which the capital stock or bonds or any part of either is, or shall be, pledged hereunder, all conveyances or assurances in law necessary to bring under the lien of this indenture any and all property connected with or appurtenant to the property of any such company, that shall have been constructed or acquired with the proceeds of any of the bonds set apart by article one, section 3 and section 9.

103 But nothing expressed or implied in this indenture is intended, or shall be construed, to limit the right or power of the railroad company, hereby distinctly reserved, by the use of its credit or in any manner other than by the use of such reserved

bonds, to construct or acquire, other lines of railway, branches or extensions, or interests therein, free from the lien hereof.

SEC. 4. The railroad company shall and will, at its office or agency in the city of New York, keep a sufficient register or registers of bonds issued hereunder, which registers at all reasonable times shall be open to the inspection of the trustee; and, upon presentation for such purpose, it will register therein any coupon bonds issued under the provisions hereof; and it shall and will register therein all bonds without coupons issued under the provisions hereof. As to all bonds so registered, the person in whose name the same shall be registered shall for all purposes be deemed and regarded as the owner thereof, and thereafter payment of or on account of the principal sum in such bond mentioned shall be made only to such registered holder or upon his order, but such registration may be changed as hereinafter provided. All such payments so made shall be valid and effectual to satisfy and discharge the liability upon such bond to the extent of the sum or sums so paid.

Upon presentation of any coupon bond which shall have been registered as aforesaid, with the order or assignment of the registered holder, the same shall be transferred upon such register to the person named in such written order or assignment, and thereafter such transferee or transferees of such bond shall be held to be the owner or owners thereof with all incidental rights and powers, and from time to time such transfers may be made as the registered holder of any such bond for the time being may direct as aforesaid. The registered holder of any such coupon bond shall also have the right to cause the same to be registered as payable to bearer, in which case transferability by delivery shall be restored, and thereafter
104 the principal thereof shall be payable to any person presenting the same. Any holder of a coupon bond registered to bearer may cause such bond to be registered in the name of such holder with the same effect as a first registration thereof; and successive registrations as aforesaid may be made from time to time as desired. Such registration of any coupon bond shall not restrain the negotiability of any coupon thereto belonging, but every such coupon shall continue to pass by delivery merely.

ARTICLE FOUR.

SECTION 1. Neither any coupon belonging to any bond hereby secured, nor any interest obligation in respect of any registered bond which in any way on or after maturity shall be transferred or pledged separate and apart from its bond, shall be entitled to any benefit of or from this indenture, except after the prior full payment of the principal of all bonds issued hereunder, and of all coupons and interest obligations not so transferred or pledged.

SEC. 2. Until default shall have been made in the due and punctual payment of any interest, or in the due and punctual payment of any principal sum, of any bond hereby secured, or in the due and punc-

tual performance and observance of any covenant or condition hereof obligatory upon the railroad company, and, until any such default continuing beyond the period of grace, if any, herein provided in respect thereof, shall have become the subject of some action hereunder by the trustee or by the bondholders as hereinafter authorized, or until a receiver shall have been appointed, or until the railroad company voluntarily shall have surrendered possession to the trustee as hereinafter permitted, the railroad company, its successors and assigns, shall be suffered and permitted in any manner,
105 and to any extent, not affecting the lien of this indenture, to retain actual possession of all and every the premises hereby mortgaged (other than bonds and certificates of stock) and the same and every part thereof, with the rights and franchises appertaining thereto, and the tolls, income, rents, issues and profits thereof, to manage, operate, collect, receive, use and enjoy in the same manner and to the same extent as if this indenture had not been made.

SEC. 3. In case default shall be made in the payment of any interest on any prior lien bond or on any general lien bond at any time issued under and secured by this indenture, or on any bond secured by any mortgage recited in article one, section 5, I, II, and IV, or in section 8, and such default shall continue for a period of six months; or in case default shall be made in the due and punctual payment of the principal of any prior lien bond or of any general lien bond secured hereby, or when and as the same shall be demanded in the due and punctual payment of the principal of any bond secured by any mortgage recited in article one, section 5, I, II, and IV, or in section 8; or in case default shall be made by the railroad company in the payment of any tax, assessment or other governmental charge lawfully imposed or levied upon any part of the mortgaged property and premises, or the income and profits thereof, and such default shall continue for a period of six months after written notice thereof from the trustee or from holders of five per cent in amount of the bonds hereby secured; or in case the railroad company shall make default in the due observance and performance of its covenant of further assurance, or any other covenant, promise or condition herein contained, and any such default shall continue for a period of six months after written notice thereof from the trustee or from the holders of five per cent in amount of the bonds hereby secured; then, and in
106 each and every such case of default (provided, however, in respect of each of the three cases so indicated that it shall have continued for six months as aforesaid), the trustee personally, or by its agent or agents, attorney or attorneys, may enter into and upon all or any part of the railways, property and premises, lands, rights, interests, and franchises hereby conveyed or intended so to be, and each and every part thereof, and may exclude the railroad company, its agents and servants, wholly therefrom, and having and holding the same may use, operate, manage, and control said railways and other premises, regulate the tolls for the transportation of passengers and freight thereon, and conduct the business thereof, either

personally or by its superintendents, managers, receivers, agents, and servants or attorneys, to the best advantage, as well of the public as of the holders of the bonds hereby secured in accordance with law and with any statute relating to said railways and other premises or any part thereof, or to the operation thereof; and, upon every such entry, the trustee, at the expense of the trust estate, from time to time, by either purchase, repairs, or construction, may maintain and restore, and insure or keep insured, the rolling stock, tools and machinery and other property, buildings, bridges, and structures erected or provided for use in connection with said railways and other premises, and whereof it shall become possessed, as aforesaid, in the same manner and to the same extent as is usual with railway companies, and likewise from time to time, at the expense of the trust estate, may make all necessary or proper repairs, renewals and replacements and useful alterations, additions, betterments and improvements thereto and thereon, as well in respect of the rolling stock or equipments as in respect of the railways and appurtenances and other subject matters as to it may seem judicious; and it may collect and receive all tolls,
freights, incomes, rents, issues, and profits of the same and
107 every part thereof, and also the income from stocks and bonds
pledged hereunder, and after deducting the expenses of operating said railways, and other premises and of conducting the business thereof, and of all repairs, maintenance, renewals, replacements, alterations, additions, betterments and improvements, and all payments which may be made for taxes, assessments, insurance, and prior or other proper charges upon the said premises and property, or any part thereof, as well as just and reasonable compensation for its own services and for all agents, clerks, servants, and other employees by it properly engaged and employed, it shall apply the moneys arising as aforesaid as follows:

In case the principal of the prior lien bonds hereby secured shall not have become due, to the payment of the interest remaining in default in the order of the maturity of the installments of such interest, first, upon any and all "prior lien bonds," and, after satisfaction thereof, then upon any and all "general lien bonds," and next, if the principal of the general lien bonds shall have become due by declaration or otherwise, to the payment of the principal of all general lien bonds; such payments in every instance to be made ratably to the persons or parties entitled thereto without discrimination or preference; but,

In case the principal of the prior lien bonds shall have become due by declaration or otherwise, first, to the payment of the accrued interest in the order of the maturity of the installments thereof, upon any and all prior lien bonds, and next to the payment of the principal of all prior lien bonds, and, after satisfaction thereof, to the payment in like manner of the interest accrued upon any and all general lien bonds, and finally to the payment of the principal of all general lien bonds; in every instance such payments to be made ratably to the persons or parties entitled to such payment, without any discrimination or preference;

108 These provisions, however, not being intended in any wise to modify the provisions of section 1 of this article.

Upon and during such continuance of any such default, either with or without entry, the trustee shall have, exercise, and enjoy the right to vote on all shares of stock pledged or agreed to be pledged hereunder, and for the benefit of the holders of bonds hereby secured to receive and collect all interest moneys and dividends maturing or payable upon all pledged bonds and stocks, and as holders of such shares of stock and of such bonds pledged or agreed to be pledged in this indenture, to perform any and all acts, or to make or execute any and all requests, requisitions, or other instruments.

SEC. 4. In case default shall be made by the railroad company in the payment of any interest on any prior lien bond, and such default shall continue for a period of six months, then and in every such case of continuing default, upon the written request of the holders of twenty-five per cent in amount of the prior lien bonds hereby secured then outstanding, the trustee shall, by notice in writing delivered to the railroad company, declare the principal of all prior lien bonds hereby secured then outstanding to be due and payable immediately, and upon any such declaration the same shall become and be immediately due and payable, anything in this indenture or in said bonds contained to the contrary thereof in any wise notwithstanding.

In case default shall be made by the railroad company in the payment of any interest on any prior lien bond or any general lien bond hereby secured at any time issued and outstanding, and such default shall continue for a period of six months, then and in every such case of continuing default, upon the written request of the holders of twenty-five per cent in amount of the general lien bonds
109 hereby secured then outstanding, the trustee, by notice in writing delivered to the railroad company, shall declare the principal of all general lien bonds hereby secured, then outstanding, to be due and payable immediately, and upon any such declaration the same shall become and be immediately due and payable, anything in this indenture or in said bonds contained to the contrary thereof in any wise notwithstanding.

Each and every provision of this section is, however, subject to the condition (as to each of said two issues of bonds respectively), that if at any time after the principal of either of said two issues shall have been so declared due and payable, all arrears of interest upon all bonds of such issue shall either be paid by the railroad company or be collected out of the mortgaged premises before any sale of the mortgaged premises shall have been made, then and in every such case the holders of a majority in amount of the bonds of such issue hereby secured then outstanding, by like written notice to the railroad company and to the trustee, may waive such default and its consequences as to such issue; but no such waiver shall extend to or affect any bonds of the other issue or any subsequent default as to either issue, or impair any right consequent thereon.

In case the trustee shall have proceeded to enforce any right under this indenture by foreclosure, entry or otherwise, and such proceedings shall have been discontinued or abandoned because of such waiver, or for any other lawful reason, or shall have been determined adversely to the trustee, then and in every such case, the railroad company shall be restored to its former position and rights in respect of the mortgaged premises and the shares of stock and bonds, and other property, herein pledged or agreed to be pledged; and, upon the written request of the railroad company, the trustee shall do, make, execute, acknowledge and deliver such acts, deeds, instruments, and assurances in the law as may be required to effectuate such
110 purpose; but, neverthless, all rights, remedies, and powers of the trustee shall survive and continue as though no such proceedings had been taken.

SEC. 5. In case default shall be made by the railroad company in the payment of any interest on any prior lien bond or on any general lien bond secured by this indenture, or on any bond secured by any mortgage recited in article one, section 5, I, II, and IV, or in section 8, and such default shall continue for a period of six months; or in case default shall be made by the railroad company in the due and punctual payment of the principal of any prior lien bond or of any general lien bond secured hereby, or when and as the same shall be demanded in the due and punctual payment of the principal of any bond secured by any mortgage recited in article one, section 5, I, II, and IV, or in section 8; or in case default shall be made by the railroad company in the payment of any tax, assessment or other governmental charge lawfully imposed or levied upon any part of the mortgaged property and premises or the income and profits thereof, and such default shall continue for a period of six months after written notice thereof from the trustee or from holders of five per cent in amount of the bonds hereby secured; or in case the railroad company shall make default in the due observance and performance of its covenant of further assurance, or any other covenant, promise or condition herein contained, and any such default shall continue for a period of six months after written notice thereof from the trustee or from the holders of five per cent in amount of the bonds hereby secured, then, and in each and every such case of default (provided, however, in respect of each of the three cases so indicated, that it shall have continued for six months as aforesaid), the trustee, with or without entry, personally or by attorney, in its discretion (a) may sell to the highest and best bidder, in one lot and as an entirety, all and singular the mortgaged property and premises, bonds, and
111 stocks, rights, franchises and interests, lands and appurtenances, and all right, title and interest, claim and demand therein, and right of redemption thereof; which sale shall be made at public auction at such place in the city of Elmira, in the State of New York, or at such other place on the railroad hereby mortgaged, at such time and upon such terms as may be specified in the notice of sale to be given as herein provided; or (b) may proceed to protect and enforce

the rights of bondholders under this indenture, by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for the foreclosure of this indenture, or for the enforcement of any other appropriate legal or equitable remedy as the trustee, being advised by counsel learned in the law, shall deem most effectual to protect and to enforce any of its rights or duties hereunder.

Upon either (c) the written request of the holders of twenty-five per cent in amount of the general lien bonds, in case of any such continuing default, or (d) the written request of the holders of twenty-five per cent in amount of the prior lien bonds at the time outstanding, in case of any such continuing default other than in the payment of the principal or interest of the general lien bonds, it shall be the duty of the trustee upon being indemnified as hereinafter provided to take all needful steps for the protection and enforcement of its rights and the rights of the bondholders secured hereby, and to exercise the powers of entry and sale herein conferred, or both, or to take appropriate judicial proceedings according to such request, or in default of specific instructions by such bondholders to proceed by action, suit, or otherwise, as the trustee being advised by counsel learned in the law shall deem most expedient in the interest of the holders of the bonds hereby secured.

Provided, nevertheless, that no foreclosure of this mortgage
112 or sale of the mortgaged premises pursuant to judicial proceedings or under the powers of sale conferred upon the trustee hereunder, shall affect any right or lien of the holders of the prior lien bonds or accelerate or precipitate the maturity thereof, unless such foreclosure or sale be had upon the written request of the holders of twenty-five per cent in amount of the prior lien bonds then outstanding; it being the intention that the lien and rights of such prior lien bonds shall continue unaffected by any sale or foreclosure hereunder unless made upon such request of holders of prior lien bonds; but that in case of any default the trustee, in its discretion, may make, and such holders of twenty-five per cent in amount of general lien bonds may require, a sale or foreclosure subject to the prior lien bonds, and not otherwise, unless a sale or foreclosure shall have been requested by the holders of twenty-five per cent in amount of the prior lien bonds as above authorized.

Notice of any sale pursuant to any provision of this indenture shall state the time and place, when, and where, and the terms upon which the same is to be made, and shall contain a brief description of the property to be sold, and shall be sufficiently given if published once in each week for six successive weeks prior to such sale in one newspaper at that time published in each of the cities of New York, N. Y.; Buffalo, N. Y.; Newark, N. J.; Susquehanna, Pa.; Cleveland, O.; Indianapolis, Ind.; and Chicago, Ill.

Upon the completion of any sale or sales under this indenture the trustee shall make, execute, and deliver to the accepted purchaser or

purchasers a good and sufficient deed, or good and sufficient deeds, of conveyance, for the property and franchises sold.

In case the mortgaged and pledged premises shall be sold upon a default hereunder and such sale shall be made not subject to the lien of the prior lien bonds, hereby secured, the whole of the principal sum of all the bonds of both issues hereby secured, if not previ-
113 ously declared due, shall at once become due and payable, anything in said bond or bonds or herein contained to the contrary notwithstanding.

In case of any sale or sales made subject to the lien of the prior lien bonds, the whole of the principal of all the general lien bonds, if not previously declared due, shall at once become due and payable, anything in said bond or bonds or herein contained to the contrary notwithstanding; but no such sale made subject to the lien of the prior lien bonds, shall in anywise affect the maturity or lien of the prior lien bonds or any right or remedy in respect thereof.

SEC. 6. None of the remedies provided in the preceding sections 3 and 5, shall apply, nor shall they be enforced, by reason of any default, in respect of any of the old bonds or obligations specified in article one, section 5, IV, and section 8, II, until after the railroad company shall have acquired, as provided in section 2 of article one, the New York, Pennsylvania and Ohio Railroad, or the control thereof, and shall have subjected the same to the lien of this indenture.

SEC. 7. For all purposes and within the meaning of the preceding sections 3, 4 and 5, and also sections 13 and 16 of this article, any default in payment of principal or interest of any prior lien bonds shall constitute a default entitling the holders of general lien bonds to all rights and remedies hereunder as though such default were in respect of general lien bonds.

SEC. 8. Any sale or sales completed under or by virtue of this indenture, shall operate to divest all right, title, interest, claim and demand whatsoever, either at law or in equity, of the railroad company of, in and to the premises hereby mortgaged, and shall be a perpetual bar both at law and in equity against the railroad company, its successors and assigns, and against any and all persons claiming or to claim the mortgaged premises, or any part or parcel
114 thereof, by, from, through or under the railroad company, its successors and assigns, or any of them; provided, however, that in case of a foreclosure or sale hereunder made subject to the lien of the prior lien bonds, then and in such event the lien of the prior lien bonds shall continue unimpaired, and the holders thereof through the trustee, or otherwise as in this indenture provided, shall have and may thereafter assert all their rights and remedies to the same extent as though there had been no foreclosure or sale hereunder.

Any sale pursuant to any provision hereof, because of any default of the railroad company, whether made under the power of sale hereby granted and conferred, or under or by virtue of judicial proceedings, or some judgment or decree of foreclosure and sale made by any court of competent jurisdiction, shall be made subject to the lien

of any mortgage or mortgages prior to this indenture upon any prop
erty hereby conveyed to the extent of such lien or liens respectively.

SEC. 9. The trustee may, from time to time adjourn any sale to b
made by it under the provisions of this indenture, by announcemen
at the time and place appointed for such sale, or for such adjourne
sale or sales; and, so adjourning such sale, it may without furthe
notice or publication make sale of the mortgaged premises at the tim
and place to which the same shall be so adjourned.

SEC. 10. The receipt of the trustee shall be sufficient discharge t
the purchaser or purchasers of the property, sold as aforesaid, fo
the purchase money, and no such purchaser or purchasers, or hi
their or its representatives, vendees, grantees or assigns, after payin
such purchase money and receiving such receipt, shall be bound t
see to the application of such purchase money upon or for any trus
or purpose of this indenture, or in any manner whatsoever b
answerable for any loss, misapplication or non-application o
115 any such purchase money, or any part thereof, or be bound t
inquire as to the authorization, necessity, expediency or regu
larity of any such sale.

SEC. 11. The proceeds or avails of any sale under any provision o
this indenture, and the purchase money paid thereon shall be applie
as follows:

First. To the payment of the costs and expenses of such sal
including a reasonable compensation to the trustees, its agents, attor
neys, and counsel, and of all expenses, liabilities, and advances mad
and incurred by the trustee in managing and maintaining the propert
hereby conveyed or so intended to be, and of all taxes, assessments o
liens prior to the lien of these presents, except any taxes, assessments o
other superior liens to which such sales shall have been made subject

Second. To the payment of the whole amount then owing or un
paid upon the bonds hereby secured for principal and interest, an
in case such proceeds shall be insufficient to pay in full the whol
amount so due and unpaid upon the said bonds, then to the payment o
such principal and interest, without preference or priority of principa
over interest, or of interest over principal, or of any installment of in
terest over any other installment of interest, ratably, to the aggregat
of such principal and the accrued and unpaid interest, subject, how
ever, to the provisions of section 1 of this article; provided, that th
prior lien bonds shall be first paid in full as to both principal an
interest, before any payment shall be made on the general lien bonds
unless such sale shall have been made subject to the continuing lie
and rights of the prior lien bonds, in which event and arrears o
interest in default on the prior lien bonds shall first be paid unde
this second paragraph, and with this exception the entire paymen
under this second paragraph shall go to the holders of the "genera
lien bonds" or the coupons thereof, as above provided.

116 Third. To the payment of the surplus, if any, to the railroa
company, its successors or assigns, or to whomsoever may b
lawfully entitled to receive the same.

SEC. 12. The railroad company shall not and will not at any time insist upon or plead, or in any manner whatever claim, or take the benefit or advantage of, any stay or extension law now or at any time hereafter in force in any locality where the mortgaged premises, or any part thereof, may or shall be situate, nor will it claim, take or insist on, any benefit or advantage from any law now or hereafter in force, providing for the valuation or appraisement of the mortgaged premises, or any part thereof, prior to any sale or sales thereof to be made pursuant to any provision herein contained, or to the decree of any court of competent jurisdiction; nor after any such sale or sales will it claim or exercise any right under any statute enacted by the Congress of the United States or by the legislature of any State to redeem the property so sold, or any part thereof; and it hereby expressly waives all benefit and advantage of any such law or laws; and it agrees that it will not hinder, delay or impede the execution of any power herein granted and delegated to the trustee, but that it will suffer and permit the execution of every such power, as though no such law or laws had been made or enacted.

SEC. 13. No holder of any bond or coupon hereby secured shall have any right to institute any suit, action or proceeding in equity or at law for the foreclosure of this indenture or for the execution of any trust thereof, or for the appointment of a receiver, or for any other remedy hereunder, without first giving to the trustee written notice of the fact that default has occurred and continued as hereinbefore provided, nor unless also the holders of twenty-five per cent in amount of the issue of bonds hereby secured and affected by such default and then outstanding in respect of which such holder requests action,
117 shall have made written request of the trustee, and shall have afforded to it reasonable opportunity either itself to proceed to exercise the powers hereinbefore granted, or to institute such action, suit or proceeding in its own name, nor unless also they shall have offered to the trustee adequate security and indemnity against the cost, expenses and liabilities to be incurred therein or thereby; and such notification, request and offer of indemnity are hereby declared in every such case at the option of the trustee to be conditions precedent to the execution of the powers and trusts of this indenture and to any action, or cause of action, for foreclosure or for the appointment of a receiver, or for any other remedy hereunder; it being understood and intended that no one or more holders of bonds and coupons shall have any right in any manner whatever to affect, disturb or prejudice the lien of this indenture by his or their action, or to enforce any right hereunder, except in the manner herein provided, but that all proceedings at law or in equity shall be instituted, had and maintained in the manner herein provided and for the equal benefit of all holders of such outstanding bonds and coupons according to the tenor and terms of the two issues of bonds hereunder issued and hereby secured. A default in the payment of interest upon general lien bonds only shall not be deemed a default affecting prior lien bonds.

SEC. 14. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the trustee or to the holders of bonds secured hereby is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative, and shall be in addition to every other remedy given hereunder or existing at law or in equity or by statute.

SEC. 15. The personal property and chattels hereby conveyed,
118 or intended so to be, shall be real estate for all the purposes of this indenture, and shall be held and taken to be fixtures and appurtenances of the said railroads and part thereof, and are to be used and sold therewith and not separate therefrom.

SEC. 16. Upon proper indemnity to the trustee, the holders of a majority in amount of each of the two issues of bonds hereby secured and then outstanding (the holders of each issue being considered and counted as a separate class) in case of any subsisting default other than in the payment of the interest on or principal of the general lien bonds, or the holders of a majority in amount of general lien bonds if such default be only as to interest upon, or principal of, those bonds, anything in this indenture contained to the contrary notwithstanding, from time to time, shall have the right to direct and control any and all proceedings theretofore instituted for any sale of the premises hereby conveyed and pledged, or agreed or intended so to be, or for the foreclosure of this indenture, or for the appointment of a receiver, or any other proceedings hereunder, and for that purpose to instruct the trustee to continue or to discontinue any such proceedings hereunder; and no such action by the trustee or by such majority shall extend to, or be taken to affect, any subsequent default or to impair any right resulting therefrom. But nothing herein is intended to limit any power of the trustee to exercise any right or to apply or enforce any remedy under any of the provisions of this indenture, unless the trustee be otherwise expressly directed, as in this section provided, by the requisite number and class of holders of bonds hereby secured.

SEC. 17. In case of any sale hereunder, any and all purchasers in making settlement or payment, shall be entitled to turn in any bonds and any matured and unpaid coupons hereby secured, estimating the value of such bonds and coupons for that purpose at the sum
119 payable out of the net proceeds of such sale to the holder or holders of such bonds and coupons as his or their ratable share of such net proceeds, after allowing for the proportion of the total payment required to be made in cash for the cost and expenses of the sale or otherwise; and if such share of net proceeds shall be less than the amount then due upon such bonds and coupons, such purchaser or purchasers may make such settlement by receipting on each bond the amount to be credited thereupon; and at any and every such sale any or all of the bondholders may bid for and purchase such property, and upon compliance with the terms of sale may hold and retain and dispose of such property without further accountability therefor.

SEC. 18. Any request in writing or other instrument required by this indenture to be signed and executed by bondholders may be in

any number of concurrent instruments of similar tenor and date, and may be signed or executed by such bondholders in person or by attorney in fact. Proof of the execution of any such request or other instrument, and of the holding by any person of any of said coupon bonds transferable by delivery, shall be sufficient for any purpose of this indenture, if made in the following manner:

The fact and date of the execution by any person of any such request or other instrument may be proved by the certificate of any notary public, or other officer authorized to take acknowledgments of deeds to be recorded in New York, that the person signing such request or other instrument acknowledged to him the execution thereof, or by an affidavit of a witness of such execution.

The amount of coupon bonds transferable by delivery, held by any person executing any such request or other instrument as the holder of bonds, and the amounts and issue numbers of the bonds held by such person, and the date of his holding the same, may be proved by a certificate in writing executed by any trust company, bank, bankers, or other depositary (wherever situated), whose certificate shall be deemed by the trustee to be satisfactory, showing that such person had on deposit with such depositary the bonds described in such certificate at the date therein mentioned. Such proof shall be conclusive in favor of the trustee with regard to any action taken by it under such request or other instrument.

SEC. 19. Upon filing a bill in equity, or upon commencement of any other judicial proceedings to enforce any right of the trustee or of the bondholders under this indenture, the trustee shall be entitled to exercise the right of entry herein conferred, and also any and all other rights and powers herein and hereby conferred and provided to be exercised by the trustee upon the occurrence and continuance of default as hereinbefore provided, and as matter of right the trustee shall be entitled to the appointment of a receiver or receivers of the premises hereby mortgaged and of the earnings, income, revenue, rents, issues, or profits thereof, with such powers as the court making such appointment shall confer.

SEC. 20. No delay or omission of the trustee or of any holder of bonds hereby secured to exercise any right or power arising from any default continuing as aforesaid shall exhaust or impair any such right or power, or be construed to be a waiver of any such default, or an acquiescence therein.

SEC. 21. The railroad company, at any time hereafter before full payment of the bonds secured hereby, and whenever it shall deem expedient for the better security of such bonds, although there be then no default entitling the trustee to enter into possession, may surrender and deliver to the trustee full possession of the whole or any part of the property, premises, and interests hereby conveyed, or intended so to be, for any period, fixed or indefinite. Upon such surrender and delivery the trustee, at its option, may enter into and upon the premises so surrendered and delivered, and may take and receive possession thereof, for such period, fixed or indefinite,

121 as aforesaid, without prejudice, however, to its right at any time subsequently, when entitled thereto by any provision hereof, to insist upon and to maintain such possession, though beyond the expiration of any prescribed period. Upon any such voluntary surrender and delivery of said property and premises, or of any part thereof, the trustee, from the time of its entry, shall and will work, use, manage, control, and employ the same in accordance with the provisions of this indenture, and shall and will receive and apply the income and revenues thereof as provided in section 3 of this article. Upon application of the trustee, and with consent of the railroad company, if there be then no subsisting default hereunder, and without such consent, if there shall then be a subsisting default, a receiver or receivers may be appointed to take possession of and to operate and manage the whole or any part of said property, with all the rights, powers, and duties by this section conferred upon the trustee, and in every case when a receiver of the whole or any part of the said property shall be appointed under this section or otherwise the trustee shall be entitled to receive all the income and profits of such property for the benefit of the holders of bonds hereby secured.

SEC. 22. In the event of any sale, pursuant to any provision hereof, whether made under the power of sale hereby granted and conferred, or under or by virtue of judicial proceedings, or of some judgment or decree of foreclosure and sale made by any court of competent jurisdiction, the whole of the property hereby mortgaged and pledged shall be sold in one parcel and as an entirety, including all the rights, titles, estates, railroads, equipment, franchises, leases, leasehold interests, contracts, stocks, bonds, and other real and personal property of every name and nature; and this provision shall bind the parties hereto and each and every of the holders of the bonds and coupons hereby secured or intended so to be. And the trustee and its successors are hereby appointed the true and lawful attorney or
122 attorneys, irrevocable, of the railroad company, in its name and stead to make all necessary deeds and conveyances of property and all necessary transfers of the shares of stock or bonds or other obligations thus sold, and for that purpose it and they may execute all necessary acts of assignment and transfer, and may substitute one or more persons with like power, the railroad company hereby ratifying and confirming all that its said attorney or attorneys, or such substitute or substitutes, shall lawfully do by virtue hereof.

SEC. 23. Until default shall be made by the railroad company in the payment of either the principal or interest of the bonds hereby secured, or otherwise, as set forth in sections 3 and 5 of this article or either of them, and until the trustee, as herein authorized, shall have taken some proceeding in respect thereof, or until a receiver shall have been appointed as hereinbefore permitted, the railroad company shall be entitled to receive all interest payable, and dividends declared, in respect of any bonds or stocks by or pursuant to

this indenture pledged or transferred to the trustee as collateral security for the payment of the bonds issued hereunder, the coupons for such interest from time to time to be delivered by the trustee to the railroad company for such purpose, and immediately upon such delivery to be collected and canceled to the satisfaction of the trustee; suitable orders, in favor of the railroad company, or its nominee, for the payment of such dividends from time to time to be executed and delivered by the trustee to the railroad company.

SEC. 24. Until default be made as aforesaid, and some action in respect thereof shall have been taken by the trustee, or by bondholders, as herein authorized, the railroad company shall have the right to vote upon all shares of stock pledged hereunder, for all purposes not inconsistent with the provisions or purposes of this indenture and with the same force and effect as though such pledge had not
123 been made. From time to time the trustee shall give to the railroad company, or its nominee, suitable proxies for such purposes.

SEC. 25. The trustee may do whatever may be necessary for the purpose of maintaining or preserving the corporate existence of any and all companies whose shares are pledged hereunder, and for such purposes from time to time it may sell or assign, transfer and deliver so many shares of the stocks of the several companies as may be necessary to qualify persons to act as directors of, or in any other official relation to, said companies; provided, however, that no transfer under this provision shall be made which shall impair the trustee's control of any corporation whose shares shall be so transferred; and subject to this limitation the trustee may make such other arrangements as it shall deem necessary for the protection of the trust hereunder.

SEC. 26. If at any time the obligors in any of the bonds at any time pledged hereunder shall fail to make payment of either the principal or interest thereof, according to the tenor of such bonds, then, unless the trustee shall hold hereunder more than a majority of the stock of such obligor, (1) in any case where the trustee holds more than eighty-five per cent in amount of any one or more issues of the bonds of such obligor, and (2) in other cases according to its discretion, the trustee, upon the written request of the railroad company, and not otherwise, shall cause proper and apt proceedings to be instituted and prosecuted in some court of competent jurisdiction to foreclose the mortgage, or mortgages, by which such bonds shall be secured, and if the property covered by such mortgage, or mortgages, shall be sold under foreclosure, it shall, if it hold more than eighty-five per cent in amount of the bonds thereby secured cause such property to be purchased for and in the name or in behalf of the railroad company, if the amount bid at such sale shall not exceed the full
124 amount due on the entire issue of such bonds, and the cost and expenses of such suit and sale, and the railroad company shall furnish the necessary cash to pay such cost and expenses, any claims having priority of lien or in equity over the mortgage foreclosed

and the dividends accruing from such sale on any bonds not held by the trustee. If such property shall not be bought by the trustee, the trustee shall receive out of the proceeds of such sale the dividend accruing on the bonds held by it, and shall apply the same as herein provided. When any railroad or railroad property shall be purchased by the trustee, for and in the name of the railroad company, as above provided, the lien of this indenture immediately and ipso facto shall attach to and bind the property so purchased.

If at any time the obligors in any of the bonds at any time pledged hereunder shall fail to make payment of either the principal or interest thereof, according to the tenor of such bonds, and by reason thereof foreclosure or other proceedings shall be taken, otherwise than at the instance of the trustee, the trustee shall take such steps as in its discretion shall be best calculated to protect its interests hereunder in respect of such bonds, and for this purpose it may join in any plan or agreement of reorganization, and may accept its share of new securities under such plan.

No such action of the trustee shall relieve the railroad company from any liability hereunder by reason of such default, nor from any of the consequences thereof.

When the trustee shall receive moneys arising from the foreclosure of any mortgage executed to secure the payment of bonds pledged hereunder, or from any sale of any railroad mortgaged to secure any such bonds, it shall apply such moneys, whether principal or interest, in the manner provided in section 29 hereof, for the application of money arising from the release of real property mortgaged hereunder.

In the event of the dissolution of any corporation of whose capital stock the greater part shall be held hereunder by the trustee, such action may be taken and such power be exercised with reference thereto as the trustee in its discretion shall deem most expedient for the conservation of the interest of the trust estate in such property, either through the agency of a successor corporation or otherwise.

SEC. 27. No assignment or pledge hereunder of any shares of stock of any company or companies now or hereafter deposited hereunder, shall prevent the consolidation or merger of any one or more of said companies with, or its sale to, the railroad company, but such consolidation, merger, or sale may be made under any laws to which such companies may then be subject, anything in this indenture contained to the contrary notwithstanding: Provided, however, that such consolidation, merger, or sale shall be made only upon such terms as shall be approved by the trustee, or by the holders of a majority in interest of the bonds secured by this indenture. In the event of consolidation or merger of any one or more of the said companies with, or its sale to, the railroad company, this indenture immediately shall become and be a lien upon the property of the company so consolidated or merged with, or sold to, the railroad company, with the same force and effect as if expressly conveyed by this indenture, and the holders of the bonds hereby secured shall always have as full and complete a lien

upon such property as that herein created by the pledge of the stock and bonds of such constituent companies, to the trustee hereunder.

Neither shall the assignment or pledge hereunder of any capital stock of any company or companies prevent the consolidation or merger of any such companies with each other; but such consolidation or merger may be made under any laws to which such companies may then be subject, anything in this indenture contained to the contrary notwithstanding: Provided, however, that such consolidation or merger shall be made only upon such terms as shall be approved by the holders of a majority in amount of the bonds secured
126 by this indenture; and that the portion of the capital stock of any such consolidated or merging company (but never less than a majority thereof), issued for and in lieu of any stock previously pledged hereunder, shall always bear to the total capital stock a proportionate relation at least as high as that borne by such previously pledged stock to the total capital stock of such constituent companies. Such portion of such stock of such consolidated or merging company shall be assigned to and deposited with the trustee, and shall become and be subject to the lien of this indenture with the same force and effect as if expressly pledged by this indenture; and the holders of the bonds hereby secured shall always have a lien upon such portion of such stock of such consolidated or merging company as full and complete as upon the stock and bonds of such constituent companies, by reason of the pledge thereof hereunder.

The trustee may do any and all things proper to carry into effect the purposes of this section, and in order to facilitate the merger in whole or in part, as authorized by law, of any railroad the trustee may transfer into the name of the railroad company, under such restrictions as it may deem sufficient for the protection of the holders of the bonds secured hereby, the shares of any company about to be so merged, but the certificates in the name of the railroad company shall be forthwith delivered to and held by the trustee hereunder, and the railroad company shall simultaneously execute such irrevocable instruments as the trustee shall deem necessary in order to enable it to transfer such shares back into its own name if at any time it shall deem such a course expedient for the protection of the holders of the bonds hereby secured.

SEC. 28. In case of any default hereunder, if in order to preserve the franchises of the railroad company and to avoid foreclosure and sale involving the organization of a successor company, any plan of reor-
ganization shall be proposed with provisions for the modifica-
127 tion of this mortgage, so far as to authorize and require the creation of new liens upon the mortgaged premises prior and superior to the lien hereof; then and in every such case registered holders of four-fifths in amount of all outstanding bonds hereby secured, by writing may direct the trustee in behalf of all the holders of all bonds then or thereafter issued hereunder, to acquiesce in the provisions of such plan; which plan also may determine and provide for the interests of other creditors and lienors and of the shareholders

of the railroad company. This special power, however, is granted to the registered holders of four-fifths in amount of the bonds upon the express condition, that no bond hereby secured, and then outstanding, shall be changed as to amount or date of payment of principal or rate or dates of payment of interest. Thereupon, but not otherwise, the trustee shall by writing acquiesce in such provisions of such plan, and such acquiescence by the trustee shall constitute the irrevocable assent of all holders of bonds and coupons hereby secured to any such accepted modifications, as set forth in such plan and necessary to give effect to such provisions thereof. All such modifications so affecting this indenture and the bonds and coupons hereby secured, shall be reduced to a written agreement between the railroad company and the trustee, and such agreement shall be recorded in New York County, New York; Passaic County, New Jersey; Susquehanna County, Pennsylvania; Marion County, Ohio; Huntington County, Indiana; Cook County, Illinois, and thenceforth shall be deemed to be part of this indenture, and thereafter the lien of this indenture, and of the bonds hereby secured, shall be deemed to be and shall be subordinate to such new and prior liens created pursuant to such plan, but only to the extent specified in such written agreement; provided, that the consent of the holders of four-fifths of the prior lien bonds shall be requisite to the creation of any new lien or charge in priority to the prior lien bond.

128 Registration for any purpose of this section shall be sufficient if then or theretofore made and then continuing in any manner permitted by section 14 of article one of this indenture.

SEC. 29. Provided there shall then be no continuing default in respect of which the trustee shall have taken some proceedings herein authorized, the trustee, upon request of the railroad company, at any time or times, in its discretion, may release from the lien and operation of this indenture and of the bonds hereby secured, any premises acquired, held, or used by the railroad company for the purpose of stations, depots, shops, or other buildings or erections, or for other uses not connected with the maintenance or operation of some part of the lines of railway then subject to the lien of this indenture, or any premises which may have been acquired or held for the supply of gravel, fuel, and other materials for the purposes of such lines of railway; provided that in the judgment of the trustee, at the time of such release such premises shall no longer be requisite for the purposes for which the same shall have been so acquired or used, or necessary or expedient to be retained for use in connection with such lines of railway, and likewise it may release any parts of the line of track or roadway, or of the depot grounds, buildings, or accommodations connected therewith, which at the time of such release may have been thrown out of use and have ceased to form part of such lines of railway by reason of the straightening, alteration, or abandonment of such part of the lines of railway; but the power of release given by this article is to be exercised only in case the railroad company shall sell or contract to sell the property so to be

released, because no longer required for the uses or purposes of such railways, and shall require the same to be released, in order to give good title to the purchaser or purchasers thereof. The proceeds of any and all such sales shall, unless some other disposition thereof be required by some prior mortgage, be invested in the purchase
129 of other property, real or personal, which shall be conveyed in trust by the railroad company to the trustee, subject to all the trusts hereby declared, or in the purchase of bonds hereby secured (which bonds shall forthwith be canceled and delivered to the trustee); or in betterments or improvements, on in some other way, to the benefit of the mortgaged premises, and satisfaction of the trustee. When such released premises shall have been thrown out of use or shall have ceased to be required, by reason of changes of the line of the road, on or along the routes aforesaid, or any of them or change of depot grounds, buildings or other accommodations, the substitutes therefor acquired by the railroad company, ipso facto, shall become and be subject to the lien of this indenture, the same as though specifically mortgaged hereby, and as a condition of such release they shall be conveyed to the trustee by appropriate deeds upon the trusts and for the purposes of this indenture. The railroad company, from time to time, shall also have full power, according to its discretion, to dispose of such portion of the machinery, equipments and implements, at any time held or acquired for the use of any lines of railway, as may have become unfit for such use, replacing the same by new machinery, equipment or implements, which shall become subject to the operation of this indenture.

In no event shall any purchaser or purchasers of any property sold or disposed of under any provision of this article of this indenture be required to see to the application of the purchase money.

SEC. 30. In case at any time it shall become necessary, or in the judgment of the trustee be for the interest of the bondholders hereby secured, or for the benefit of the mortgaged property, that the railroad company shall make changes or alterations in, or substitutions of, any leases, contracts or trackage rights by which the railroad company now secures access to any point or points, the railroad
130 company, with the written consent of the trustee, may make any such changes, alterations or substitutions.

The railroad company, with the written consent of the trustee, may make, or to cause to be made, executed and delivered, all such instruments in writing as may be proper and necessary to carry out and perfect any and all changes, alterations or substitutions authorized in this section when and as the same may be made.

At the same time, ample provision shall be made by apt and sufficient instruments in writing, so that such modified, altered or substituted leases, contracts or trackage rights shall be, and forthwith become bound by, and subject to, the terms of this indenture in the same manner as the then existing leases, contracts and trackage rights.

SEC. 31. The trustee shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof, if such agent or attorney be selected with reasonable care; or for anything whatever, in connection with this trust, except misconduct or gross negligence; the trustee shall not be personally liable for any debts contracted by it or for damages to persons or property carried or injured, or for salaries or nonfulfillment of contracts, during any period wherein the trustee shall manage the trust property or premises upon entry or voluntary surrender as aforesaid. The trustee shall not be under any obligation to take any action towards the execution or enforcement of the trust hereby created, which in its opinion, shall be likely to involve it in expense or liability, unless one or more of the holders of the bonds hereby secured shall, as often as required by the trustee, furnish it reasonable indemnity against such expense or liability; nor shall the trustee be required to take notice of any default hereunder or to take any action in respcet thereof except after written notice of such default from one or more of the holders of the bonds hereby secured, together with
131 tender of the indemnity aforesaid, anything herein contained to the contrary notwithstanding; neither shall the trustee in any event be responsible for the proper recording of this indenture or for the filing of the same as a chattel mortgage.

The trustee shall be entitled to reasonable compensation for all services rendered by it in the execution of the trusts hereby created.

SEC. 32. The terms or words "the trustee," "said trustee," and "the said trustee," or any other equivalent term, as used in this indenture (except when otherwise clearly indicated), shall be held and construed to mean the trustee or trustees for the time being, whether original or successor, and the words "trustee," "bond," "bondholder," and "holder" shall include the plural as well as the singular number, and the term "majority" shall signify "majority in amount," whether or not so expressed.

SEC. 33. The trustee, or any trustee hereafter appointed, may resign and be discharged of the trusts created by this indenture by giving notice thereof to the railroad company and to the bondholders, by publication, at least twice a week, for six successive weeks, in one of the newspapers at that time published in each of the cities of New York, N. Y., and London, England, and by due execution of the conveyance herein required.

The trustee may be removed at any time by an instrument in writing under the hands and seals of three-quarters in amount of the holders of the bonds secured hereby and then outstanding.

SEC. 34. In case a trustee shall die, or shall resign or be removed as herein provided, a majority in amount of holders of the bonds then outstanding hereunder shall have the right and power by instrument in writing under their hands and seals to appoint a new trustee to fill such vacancy, and, until such appointment be so made by a majority of the bondholders, the board of directors of the railroad com-
132 pany may appoint a new trustee to fill such vacancy for the

time being, and in every such case the new trustee so appointed, while he or it continues as such, shall have and possess and be subject to the like rights, powers, estates, and duties as though originally trustee hereunder. Should any vacancy be filled by the railroad company under the foregoing provision in that behalf, it shall be competent for any judge of the United States in and for the Second Circuit, or for any court of competent jurisdiction in the premises, upon the application of a majority in amount of the bondholders, to annul such appointment, and to appoint as trustee the nominee of such majority.

SEC. 35. If at any time or times in order to conform to any law of any State in which the railroad company now holds or at any time hereafter shall hold any property, the railroad company shall so request, the trustee shall unite with the railroad company in the execution, delivery, and performance of all instruments and agreements necessary or proper to constitute an additional trustee or trustees to have, enjoy, and exercise in association and equally with the trustee originally named herein or its successor appointed as hereinbefore provided, any and all powers, rights, and estates hereunder, excepting only those specified in article one and in article four, sections 23, 24, 25, and 27, and the custody of the securities therein mentioned, which powers, duties, and estates shall be possessed and exercised, and such custody retained by said original trustee or such successor, notwithstanding the appointment under this section of any co-trustee or co-trustees.

SEC. 36. Should any deed, conveyance, or instrument in writing, from the railroad company or from any resigning or removed trustee, be required by any new trustee, for more fully and certainly vesting in and confirming to him or it such estate, rights, powers, and duties, any and all such deeds, conveyances, and instruments in writing
133 shall, on request, be made, executed, acknowledged, and delivered by the party from whom they may be required.

ARTICLE FIVE.

No recourse under any obligation, covenant, or agreement of this indenture, or of any bond or coupon hereby secured, shall be had against any incorporator, stockholder, officer, or director of the railroad company, or of any successor corporation, either directly or through the railroad company, by the enforcement of any assessment, or by any legal or equitable proceeding by virtue of any statute or otherwise, it being expressly agreed and understood that this mortgage and the obligations hereby secured are solely corporate obligations and that no personal liability whatever shall attach to or be incurred by the incorporators, stockholders, officers, or directors of the Railroad Company, or of any successor corporation or any or either of them, under or by reason of any or either of the obligations, covenants, or agreements in this indenture, or in any of the bonds or coupons hereby secured, expressed, and contained or implied therefrom, and that any and all personal liability of every name and nature, either at common law or in equity, or by statute, of every such

incorporator, stockholder, officer, or director, is hereby expressly waived as a condition of, and consideration for, the execution and issue of this mortgage and such obligations.

ARTICLE SIX.

If the said railroad company shall well and truly pay, or cause to be paid, the principal and interest of all bonds hereby secured at the times and in the manner therein specified, and shall well and truly keep and perform all the things herein required to be kept and performed by it, according to the true intent and meaning of this indenture, then and in that case all property, rights, and interests hereby conveyed or pledged shall revert to the railroad company, and the estate, right, title, and interest of the trustee shall thereupon
134 cease, determine, and become void; otherwise, the same shall be, continue, and remain in full force and virtue.

ARTICLE SEVEN.

All the covenants, stipulations, promises, and agreements in this indenture contained, by or in behalf of the railroad company, shall bind and be binding upon its successors and assigns, whether so expressed or not.

Nothing contained in this indenture, or in any bond hereby secured, shall prevent the consolidation or merger of the railroad company with any other corporation; provided, however, that such consolidation or merger shall not impair the lien and security of this indenture, or any of the rights or powers of the trustee, or of the bondholders hereunder, and that, upon any such consolidation or merger, the due and punctual payment of the principal and interest of all of said bonds according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this indenture, shall be assumed by the company formed by such consolidation or merger. In case the railroad company shall be consolidated or merged with any other corporation, the successor corporation formed by such consolidation or into which the railroad company shall have been merged, shall succeed to and be substituted for the railroad company, party of the first part hereto, with the same effect as if it had been named herein as such party of the first part, and such successor corporation may cause to be signed and may issue in the name of the Erie Railroad Company any or all of such bonds as shall not theretofore have been signed by the Erie Railroad Company and delivered to the trustee, and the trustee shall certify and deliver upon the order of said successor corporation and subject to all the terms, conditions, and restrictions herein prescribed, any of such bonds which shall have been previously signed by the officers
135 of the railroad company and delivered to the trustee for certification, and any of such bonds as such successor corporation shall thereafter cause to be signed and delivered to the trustee for that purpose. All the bonds so issued shall in all respects have the lien or general lien, as the case may be, theretofore or thereafter issued, same legal rank and security as the bonds of like issue, viz: Prior

in accordance with the terms of this indenture, as though all of said bonds had been issued at the date of the execution hereof.

And it is also expressly understood and agreed that for every purpose of this indenture, including the execution, issue, and use of any and all bonds hereby secured, the terms "railroad company" and "Erie Railroad Company" include and mean not only the New York corporation, but also any sole successor railroad corporation, formed by consolidation or otherwise under the laws of New York or of any State or States; and every such successor railroad corporation shall possess and from time to time may exercise each and every right and power hereunder of the Erie Railroad Company, in its name or otherwise.

ARTICLE EIGHT.

The Farmers' Loan and Trust Company, trustee, the party hereto of the second part, hereby accepts the trusts in this indenture declared and provided, and agrees to perform the same upon the terms and conditions hereinbefore set forth.

ARTICLE NINE.

In order to facilitate the record of this indenture, the same may be simultaneously executed in several counterparts, each of which so executed shall be deemed to be an original; and such counterparts shall together constitute but one and the same instrument.

In witness whereof, The Erie Railroad Company, the party
136 hereto of the first part, has caused this indenture to be signed and acknowledged or proved by its president, and its corporate seal to be hereunto affixed, and the same to be attested by the signature of its secretary; and the Farmers' Loan and Trust Company, the party of the second part, has caused its corporate seal to be hereunto affixed and attested by its secretary, and these presents to be signed and acknowledged or proved by its vice-president the day and year first above written.

ERIE RAILROAD COMPANY,
[L. S.] By E. B. THOMAS, *President.*
Attest:
J. A. MIDDLETON, *Secretary.*

THE FARMERS' LOAN AND TRUST COMPANY,
[L. S.] By R. G. ROLSTON, *President.*
Attest:
E. S. MARSTON, *Secretary.*

Signed, sealed, and delivered in the presence of—
As to Erie Railroad Company—
EDWARD R. GREEN.
GEO. H. COREY.

Signed, sealed, and delivered in the presence of—
As to the Farmers' Loan and Trust Company—
EDWARD R. GREEN.
GEO. H. COREY.

137 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered, and I do certify, that on this 16th day o December, in the year one thousand eight hundred and ninety-fiv in said city and county aforesaid, before me, the undersigned, Georg H. Corey, a notary public in and for the city and county of Ne York, in the State of New York, and a commissioner of deeds in an for the State of New York, duly appointed and commissioned a such by the respective governors of and for the States of New Jerse Ohio, Indiana, Illinois, and the Commonwealth of Pennsylvani being now duly qualified to act as such for each of said States and fo said Commonwealth, personally appeared Eben B. Thomas and Jame A. Middleton, whose names are signed to the foregoing and heret annexed mortgage deed bearing date the tenth day of Decembe 1895, as president and secretary, respectively, of Erie Railroad Com pany, with whom I am personally acquainted, and who are personall well known to me to be, and who I am satisfied are, the president an secretary, respectively, and to be the same persons whose names ar subscribed to the foregoing instrument as such president and secre tary, respectively, of Erie Railroad Company, the within-name grantor, and one of the corporations described in and which execute the said mortgage deed at my office, and in the said city and count of New York, for themselves and on behalf of said Erie Railroa Company, and being by me informed of the contents of said mort gage deed they, on this day, severally acknowledged the due execu tion of the foregoing mortgage deed on the day the same bears dat and further acknowledged that they voluntarily executed, signe sealed, and delivered the said mortgage deed as their free an
138 voluntary act and deed individually and as such president an secretary, respectively, and as the free and voluntary act an deed of the said Erie Railroad Company for the uses and purpose therein contained and set forth; and the said Eben B. Thomas an James A Middleton, being by me first duly sworn according to law did each for himself and neither for the other, on his oath, depos and say that they reside, the said Eben B. Thomas in the city o New York, and the said James A. Middleton in the city of Ne York, both in the State of New York; that the said Eben B. Thoma is the president and the said James A. Middleton is the secretary o the said Erie Railroad Company; that their names, respectivel signed in attestation of the foregoing mortgage deed, are in the sai deponents' own proper handwriting, respectively; that they know th corporate seal of the said Erie Railroad Company, the grantor in th foregoing mortgage deed named; that the seal affixed to the fore going instrument is the common or corporate seal of the said Eri Railroad Company, and was thereto affixed by authority of th board of directors, and by order of said Erie Railroad Company, a the act and deed thereof; that they signed their names thereto, eac in the presence of the other, by like authority, as president an secretary, respectively, of said company; and the said James A

Middleton did further depose and say that he was personally present and saw said Eben B. Thomas, as such president, sign the said mortgage deed and affix the common or corporate seal of the said Erie Railroad Company thereto, and heard him declare that he signed, sealed, and delivered the same as the voluntary act and deed of the said Erie Railroad Company by order of the said board of directors, and that thereupon he, the said James A. Middleton, signed his name thereto at the same time as a subscribing witness.

139 In witness whereof, I have hereunto set my hand and my respective official seals the day and year first above written.

[L. S.] GEO. H. COREY,
Notary Public, City and County of New York.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of New Jersey.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Ohio.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Indiana.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Illinois.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the Commonwealth of Pennsylvania.

140 STATE OF NEW YORK,
City and County of New York, ss:

I, Henry D. Purroy, clerk of the city and county of New York, and also clerk of the Supreme Court for said city and county, the same being a court of record do hereby certify that George H. Corey, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof and acknowledgment a notary public in and for said county, duly commissioned and sworn, and authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances for land, tenements, or hereditaments in said State of New York. And, further, that I am well acquainted with the handwriting of such notary public, and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county the 16th day of December, 1895.

[L. S.] HENRY D. PURROY, *Clerk.*

141 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered and I do certify that on this 16th day of December, in the year one thousand eight hundred and ninety-five, in said city and county aforesaid, before me, the undersigned, George H.

Corey, a notary public in and for the city and county of New York, in the State of New York, and a commissioner of deeds in and for the State of New York, duly appointed and commissioned as such by the respective governors of and for the States of New Jersey, Ohio, Indiana, and Illinois, and the Commonwealth of Pennsylvania, being now duly qualified to act as such for each of said States and for said Commonwealth, personally appeared Roswell G. Rolston and Edwin S. Marston, whose names are signed to the foregoing and hereto annexed mortgage deed bearing date the tenth day of December, 1895, as president and secretary, respectively, of The Farmers' Loan and Trust Company, with whom I am personally acquainted, and who are personally well known to me to be, and who I am satisfied are, the president and secretary, respectively, and to be the same persons whose names are subscribed to the foregoing instrument as such president and secretary, respectively, of The Farmers' Loan and Trust Company, the within-named grantee, and one of the corporations described in and which executed the said mortgage deed at my office and in the said city and county of New York, for themselves and on behalf of said The Farmers' Loan and Trust Company, and being by me informed of the contents of said mortgage deed they on this day severally acknowledged the due execution of the foregoing mortgage deed on the day the same bears date, and further acknowledged
142 that they voluntarily executed, signed, sealed, and delivered the said mortgage deed as their free and voluntary act and deed, individually and as such president and secretary, respectively, and as the free and voluntary act and deed of said The Farmers' Loan and Trust Company, for the uses and purposes therein contained and set forth, and the said Roswell G. Rolston and Edwin S. Marston, being by me first duly sworn according to law, did each for himself and neither for the other, on his oath, depose and say that they reside, the said Roswell G. Rolston in the town of Babylon and the said Edwin S. Marston in the city of Brooklyn, both in the State of New York; that the said Roswell G. Rolston is the president and the said Edwin S. Marston is the secretary of said The Farmers' Loan and Trust Company; that their names respectively signed in attestation of the foregoing mortgage deed are in the said deponent's own proper handwriting, respectively; that they know the grantee in the foregoing mortgage deed named; that the corporate seal of said The Farmers' Loan and Trust Company, seal affixed to the foregoing instrument, is the common or corporate seal of said The Farmers' Loan and Trust Company, and was thereto affixed by authority of the board of directors and by order of said The Farmers' Loan and Trust Company as the act and deed thereof; that they signed their names thereto, each in the presence of the other, by like authority, as president and secretary, respectively, as said company; and the said Edwin S. Marston did further depose and say that he was personally present and saw said Roswell G. Rolston as such president sign the said mortgage deed and affix the common or corporate seal of said The Farmers' Loan and Trust Company thereto, and heard him

declare that he signed, sealed, and delivered the same as the voluntary act and deed of said The Farmers' Loan and Trust Company by order of the said board of directors, and that thereupon he, the said Edwin S. Marston, signed his name thereto at the same time as a subscribing witness.

143 In witness whereof I have hereunto set my hand and my respective official seals the day and year first above written.

[L. S.] GEO. H. COREY,
Notary Public, City and County of New York.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of New Jersey.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Indiana.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Illinois.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the Commonwealth of Pennsylvania.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Ohio.

144 STATE OF NEW YORK,
City and County of New York, ss:

I, Henry D. Purroy, clerk of the city and county of New York, and also clerk of the Supreme Court for said city and county, the same being a court of record, do hereby certify that George H. Corey, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof and acknowledgment a notary public in and for said county, duly commissioned and sworn, and authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances for land, tenements, or hereditaments in said State of New York. And, further, that I am well acquainted with the handwriting of such notary public and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 16th day of December, 1895.

[L. S.] HENRY D. PURROY, *Clerk.*

145 NEW YORK.

Recorded in the office of the register of the city and county of New York on the 19th day of December, A. D. 1895, at 12 o'clock noon, in block series (mortgages), section 1, Liber 33, page 50, and indexed under blocks number 2, 36, 130, on the land map of the city of New York.

Witness my hand and official seal.

[L. S.] FERDINAND LEVY, *Register.*

Recorded in the office of the register of the city and county of New York on the 19th day of December, A. D. 1895, at 12 o'clock noon, in block series (mortgages), section 3, Liber 45, page 1, and indexed under blocks number 663, 668, 685, 694, 695, on the land map of the city of New York.

Witness my hand and official seal.

[L. S.] FERDINAND LEVY, *Register.*

Recorded in the office of the register of the city and county of New York on the 19th day of December, A. D. 1895, at 12 o'clock noon, in block series (mortgages), section 4, Liber 62, page 1, and indexed under blocks number 1088 and 1108 on the land map of the city of New York.

Witness my hand and official seal.

[L. S.] FERDINAND LEVY, *Register.*

146 Recorded in the office of the clerk of the county of Allegany, on the 21st day of December, 1895, in Liber 78 of mortgages, p. 89.

Witness my hand and official seal.

[L. S.] GEORGE A. GREEN,
Clerk of Allegany County.

Recorded in the office of the clerk of the county of Broome on the 21st day of December, 1895, in Liber 102 of mortgages, p. 82.

Witness my hand and official seal.

[L. S.] F. B. NEWELL,
Clerk of Broome County.

Recorded in the office of the clerk of the county of Cattaraugus, on the 21st day of December, 1895, in Liber 130 of mortages, p. 19.

Witness my hand and official seal.

[L. S.] H. S. MERRILL,
Clerk of Cattaraugus County.

147 Recorded in the office of the clerk of the county of Chautauqua, on the 20th day of December, 1895, in Liber 153 of mortgages, p. 299.

Witness my hand and official seal.

[L. S.] V. A. ALBRO,
Clerk of Chautauqua County.

Recorded in the office of the clerk of the county of Chemung, on the 20th day of December, 1895, in Liber 94 of mortgages, p. 464.

Witness my hand and official seal.

[L. S.] DAVID N. HELLER,
Clerk of Chemung County.

Recorded in the office of the clerk of the county of Erie, on the 19th day of December, 1895, in Liber 773 of mortgages, p. 484.
Witness my hand and official seal.
[L. S.]

R. L. KIRTLAND,
Deputy Clerk of Erie County.

148 Recorded in the office of the clerk of the county of Delaware on the 20th day of December, 1895, in Liber 76 of mortgages, p. 127.
Witness my hand and official seal.
[L. S.]

J. K. HOOD,
Clerk of Delaware County.

Recorded in the office of the clerk of the county of Genesee on the 19th day of December, 1895, in Liber 102 of mortgages, p. 403.
Witness my hand and official seal.
[L. S.]

CARLOS A. HULL,
Clerk of Genesee County.

Recorded in the office of the clerk of the county of Livingston, on the 23rd day of December, 1895, in Liber 111 of mortgages, p. 23.
Witness my hand and official seal.
[L. S.]

WM. E. HUMPHREY,
Clerk of Livingston County.

149 Recorded in the office of the clerk of the county of Monroe on the 20th day of December, 1895, in Liber 394 of mortgages, p. 264.
Witness my hand and official seal.
[L. S.]

K. P. SHEDD,
Clerk of Monroe County.

Recorded in the office of the clerk of the county of Niagara on the 20th day of December, 1895, in Liber 243 of mortgages, p. 446.
Witness my hand and official seal.
[L. S.]

JAMES COMPTON,
Clerk of Niagara County.

Recorded in the office of the clerk of the county of Orange on the 24th day of December, 1895, in Liber 358 of Mortgages, p. 293.
Witness my hand and official seal.
[L. S.]

W. G. TAGGERT,
Clerk of Orange County.

150 Recorded in the office of the clerk of the county of Rockland on the 20th day of December, 1895, in Liber 142 of mortgages, p. 370.
Witness my hand and official seal.
[L. S.]

CYRUS M. CRUM,
Clerk of Rockland County.

Recorded in the office of the clerk of the county of Steuben on the 26th day of December, 1895, in Liber 76 of mortgages, p. 425.
Witness my hand and official seal.
[L. S.]
J. H. GIFFIN,
Clerk of Steuben County.

Recorded in the office of the clerk of the county of Sullivan, on the 26th day of December, 1895, in Liber 76 of mortgages, p. 425.
Witness my hand and official seal.
[L. S.]
GEORGE O. FRASER,
Clerk of Sullivan County.

151 Recorded in the office of the clerk of the county of Tioga on the 21st day of December, 1895, in Liber 70 of mortgages, p. 15.
Witness my hand and official seal.
[L. S.]
F. W. RICHARDSON,
Clerk of Tioga County.

Recorded in the office of the clerk of the county of Wyoming on the 19th day of December, 1895, in Liber 67 of mortgages, p. 21.
Witness my hand and official seal.
[L. S.]
E. M. JENNINGS,
Clerk of Wyoming County.

NEW JERSEY.

Recorded in the office of the clerk of the county of Bergen on the 19th day of December, 1895, in Liber 94 of mortgages, p. 74.
Witness my hand and official seal.
[L. S.]
JOHN R. RAMSAY,
Clerk of Bergen County.

152 Recorded in the office of the register of the county of Essex on the 18th day of December, 1895, in Liber P 12 of mortgages, p. 364.
Witness my hand and official seal.
[L. S.]
WM. RIKER, JR.,
Register of Essex County.

Recorded in the office of the register of the county of Hudson on the 18th day of December, 1895, in Liber 341 of mortgages, p. 510.
Witness my hand and official seal.
[L. S.]
GEO. B. FIELDER,
Register of Hudson County.

Recorded in the office of the clerk of the county of Passaic, on the 19th day of December, 1895, in Liber X 4 of mortgages, p. 126.
Witness my hand and official seal.
[L. S.]
H. D. WINFIELD,
Clerk of Passaic County.

Recorded in the office of the secretary of the State of New Jersey on the 21st day of December, 1895, in Liber K of corporations, p. 61.
Witness my hand and official seal.
[L. S.]

HENRY C. KELSEY,
Secretary of State.

153 PENNSYLVANIA.

Recorded in the office of the recorder of deeds of the county of Jefferson, on the 24th day of December, 1895, in Mortgage Book L, p. 9.
Witness my hand and official seal.
[L. S.]

JOHN S. BARR,
Recorder of Jefferson County.

Recorded in the office of the recorder of deeds of the county of McKean, on the 21st day of December, 1895, in Liber 34 of mortgages, p. 201.
Witness my hand and official seal.
[L. S.]

GEORGE W. MITCHELL,
Recorder of McKean County.

Recorded in the office of the recorder of deeds of the county of Pike, on the 19th day of December, 1895, in Liber 12 of mortgages, p. 26.
Witness my hand and official seal.
[L. S.]

JNO. C. WESTBROOK,
Recorder of Deeds of Pike County.

154 Recorded in the office of the recorder of deeds of the county of Susquehanna, on the 30th day of December, 1895, in Liber 21 of mortgages, p. 411.
Witness my hand and official seal.
[L. S.]

SAML. S. WRIGHT,
Recorder of Susquehanna County.

Recorded in the office of the recorder of deeds of the county of Wayne, on the 23d day of December, 1895, in Liber 15 of mortgages, p. 535.
Witness my hand and official seal.
[L. S.]

STUART O. LINCOLN,
Recorder of Wayne County.

157 *Erie Railroad Company to The Mercantile Trust Company.*

Pennsylvania collateral indenture, dated February 1, 1901, securing $36,000,000 fifty-year 4% Pennsylvania collateral gold bonds. Interest payable February and August.

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163 An indenture, dated as of the first day of February, one thousand nine hundred and one, between

Erie Railroad Company (hereinafter termed the "railroad company"), a corporation organized and existing under the laws of the State of New York, party of the first part, and

The Mercantile Trust Company, of New York (hereinafter termed the "trustee"), a corporation organized and existing under the laws of the State of New York, party of the second part.

Whereas, for the purpose of making payment for shares of the capital stock of the following companies acquired or to be acquired by the railroad company, namely: Pennsylvania Coal Company, a corporation organized under the laws of the State of Pennsylvania; Erie and Wyoming Valley Railroad Company, a corporation organized under the laws of the State of Pennsylvania; and Delaware Valley and Kingston Railroad Company, a corporation organized under the laws of the State of New York; and for the purpose of providing means for its other corporate purposes and business, the railroad company desires to make and issue a series of fifty-year four per cent Pennsylvania collateral gold bonds, limited in amount so that the aggregate principal sum of such bonds outstanding at any one time shall never exceed $36,000,000, all of which bonds at any time outstanding shall be equally secured as hereinafter provided; and

Whereas, such bonds of the railroad company to be issued under and secured by this indenture are to be coupon bonds, each for the principal sum of $1,000, numbered consecutively from 1 upwards, and registered bonds, each bearing a distinctive number or designation, of the denomination of $1,000 or such multiples of $1,000 as from time to time the railroad company, by resolution of its board of directors, may authorize; and all such coupon bonds and registered bonds, from time to time, as directed by the board of directors of the railroad company, are to be executed in the name and on
164 behalf of the railroad company under its corporate seal by the president or a vice-president and the secretary or an assistant secretary of the railroad company, and are to be substantially of the following tenor:

(Form of coupon four per cent gold bond.)

No. $1,000.

UNITED STATES OF AMERICA.

Erie Railroad Company Pennsylvania collateral 4% coupon gold bond.

Know all men by these presents, that the Erie Railroad Company, a corporation, hereinafter called the "railroad company," for value received, promises to pay to the bearer, or, if registered, to the registered holder of this bond, one thousand dollars, in gold coin of the United States of America, on the first day of February, 1951, at the office or agency of the railroad company in the city of New York, N. Y., and to pay interest thereon at the rate of four per cent per annum from February 1, 1901, payable semi-annually, at the said office or agency in like gold coin on the first day of February and the first day of August, in each and every year, until the payment of said principal sum, but only upon presentation and surrender, as severally they shall mature, of the coupons therefor annexed hereto;

such United States gold coin in every case to be of the standard of weight and fineness as it existed February 1, 1901.

Both the principal and interest of this bond are payable without deduction for any tax or taxes which the railroad company or the trustee may be required to pay or to retain therefrom under any present or future law of the United States or of any State or county or municipality therein.

This bond is one of a series of four per cent gold bonds (coupon and registered) of the railroad company, issued and to be issued, for an aggregate principal sum not exceeding thirty-six million dollars at any one time outstanding, under and in pursuance of, and all equally secured by a collateral indenture, dated February 1, 1901, executed by the railroad company to the Mercantile Trust Company, of New York, as trustee, pledging all of the shares of the capital stock of the Pennsylvania Coal Company and of the Erie and Wyoming Valley Railroad Company and of the Delaware Valley and Kingston Railroad Company, now owned or hereafter ac-
165 quired by the railroad company, and fifty-one per cent of the capital stock of the New York, Susquehanna and Western Railroad Company, the certificates for which have been or shall be delivered to the trustee pursuant to said collateral indenture, to which reference hereby is made for a statement of the property pledged, the nature and extent of the security, the rights of the holders of said bonds under the same, and of the terms and conditions upon which said bonds are secured and are to be used; the officers, directors, and stockholders of the railroad company being expressly exempted, relieved, and absolved from any and all personal liability in respect of said bonds, all such liability being hereby expressly waived.

As additonal security for the retirement of every bond of this issue, at or before the stated maturity thereof, the Erie Railroad Company annually will appropriate and will pay to a sinking fund, the sum of ten cents for every ton of coal sold and delivered during the preceding year from the mines of the Pennsylvania Coal Company; and for the purposes of said sinking fund, this bond may be called in during the month of February or the month of August, in any year, at par, together with a premium of five per cent thereof and all interest then accrued; all as is more fully stated in said collateral indenture.

This bond shall pass by delivery, unless registered in the owner's name on the books of the railroad company, at its office or agency in the city of New York, such registry being noted on the bond by the bond registrar of the railroad company. After such registration, no transfer shall be valid unless made on the railroad company's books by the registered owner, and similarly noted on the bond; but the same may be discharged from registry by being transferred to bearer, and thereafter transferability by delivery shall be restored, but this bond may again from time to time be registered or transferred to bearer as before. Such registration, however, shall not

affect the negotiability of the coupons, which shall continue to be transferable by delivery merely.

The holder also, at his option, may surrender for cancellation this bond with the coupons for future interest thereon, in exchange for a registered bond without coupons, as provided in said indenture.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate hereon endorsed, of the trustee under said indenture.

In witness whereof, the Erie Railroad Company has caused these presents to be signed by its president or one of its vice-presidents, and its corporate seal to be hereunto affixed, and to be attested by its secretary or an assistant secretary, and coupons for such inter-
166 est, with the engraved signature of its treasurer, to be attached hereto, this first day of February, 1901.

ERIE RAILROAD COMPANY,

[L. S.] By . *President.*

Attest:

. *Secretary.*

(Form of registered bond without coupons.)

No. ——. $ ——.

UNITED STATES OF AMERICA.

Erie Railroad Company Pennsylvania collateral 4% registered gold bond.

Know all men by these presents, that the Erie Railroad Company, a corporation hereinafter called the "railroad company," for value received, promises to pay to or assigns, dollars, in the gold coin of the United States of America, on the first day of February, in the year 1951, at the office or agency of the railroad company in the city of New York, N. Y., and to pay interest thereon from the first day of February, or the first day of August, as the case may be, next preceding the date hereof, at the rate of four per cent. per annum, payable semiannually at said office or agency, in like gold coin, on the first day of February and the first day of August in each year, until the payment of said principal sum; such United States gold coin in every case to be of the standard of weight and fineness as it existed February 1, 1901.

Both the principal and interest of this bond are payable without deduction for any tax or taxes which the railroad company or the trustee may be required to pay or to retain therefrom, under any present or future law of the United States, or of any State or county or municipality therein.

This bond is one of a series of four per cent gold bonds (coupon and registered) of the railroad company, issued and to be
167 issued, for an aggregate principal sum not exceeding thirty-six million dollars at any one time outstanding, under and in

pursuance of, and all equally secured by, a collateral indenture, dated February 1, 1901, executed by the railroad company to the Mercantile Trust Company, of New York, as trustee, pledging all of the shares of the capital stock of the Pennsylvania Coal Company, and of the Erie & Wyoming Valley Railroad Company, and of the Delaware Valley and Kingston Railroad Company, now owned or hereafter acquired by the railroad company, and fifty-one per cent of the capital stock of the New York, Susquehanna and Western Railroad Company, the certificates for which have been or shall be delivered to the trustee pursuant to said collateral indenture, to which reference is hereby made for a statement of the property pledged, the nature and extent of the security, the rights of the holders of said bonds under the same, and of the terms and conditions upon which said bonds are secured, and are to be used; the officers, directors, and stockholders of the railroad company being expressly exempted, relieved, and absolved from any and all personal liability in respect of said bonds, all such liability being hereby expressly waived.

As additional security for the retirement of every bond of this issue, at or before the stated maturity thereof, the Erie Railroad Company annually will appropriate and will pay to a sinking fund the sum of ten cents for every ton of coal sold and delivered during the preceding year from the mines of the Pennsylvania Coal Company; and for the purposes of said sinking fund this bond may be called in during the month of February or the month of August, in any year, at par, together with a premium of five per cent thereof, and all interest then accrued; all as is more fully stated in said collateral indenture.

This bond is transferable by the registered holder hereof, in person or by attorney duly authorized, on the books of the railroad company, at its office or agency in the city of New York, upon surrender and cancellation of this bond; and thereupon a new registered bond will be issued to the transferee in exchange therefor, as provided in said indenture, and on payment, if the railroad company shall so require, of the charge therein provided for. This bond also, in the manner prescribed in said indenture and upon payment of the charge therein provided for, is exchangeable for coupon bonds for the same aggregate principal sum.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon endorsed, of the trustee under said indenture.

In witness whereof the Erie Railroad Company has caused these presents to be signed by its president, or one of its vice-presi-
168 dents, and its corporate seal to be hereunto affixed, and to be attested by its secretary or an assistant secretary, this day of .

[L. S.] ERIE RAILROAD COMPANY,

By , *President.*

Attest:

, *Secretary.*

And whereas there are to be attached to the said coupon bonds, the time of the issue thereof, coupons representing the semi-annu instalments of interest which shall become due thereon to and inclu ing the first day of February, 1951, each of which coupons is to substantially of the following tenor, viz:

(Form of interest coupons, of which the first is to be payable August 1, 190

No. $20.0

On the first day of Erie Railroad Company will pay to bear at its office or agency in the city of New York N. Y., twenty dolla gold coin of the standard existing February 1, 1901, without dedu tion for taxes, being six months' interest then due on its collater four per cent gold bond No.

Treasurer.

And whereas there is to be endorsed on each of said coupon bon and registered bonds without coupons a certificate of the trustee th it is one of the bonds issued hereunder, and no bond shall be secur by this indenture or be obligatory for any purpose unless such certi cate shall have been executed by the trustee, such trustee's certifica to be substantially of the following tenor, viz:

169 [Form of Trustee's certificate.]

This bond is one of a series of bonds described in the within-me tioned indenture, executed by Erie Railroad Company to the unde signed as trustee.

THE MERCANTILE TRUST COMPANY,

By

And whereas each of the coupons to be attached to such coup bonds is to be authenticated by the engraved fac-simile of the sign ture of the present treasurer, or of any future treasurer, of the ra road company, and the railroad company may adopt and use for th purpose the engraved signature of any person who shall have be such treasurer, notwithstanding the fact that he may have ceas to be such treasurer at the time when such bonds shall actually certified and delivered; and

Whereas the execution and delivery of this indenture, and t execution and issue of said bonds, have been duly and unanimous authorized by all the stockholders and by the board of directors the railroad company, and in pursuance of such authority and of and every legal power and authority in it vested the railroad co pany proposes to make and execute, and from time to time to issue, t bonds secured hereby:

Now, therefore, this indenture witnesseth:

That in order to secure the payment of the principal and intere of all such bonds at any time issued and outstanding under th

indenture and the performance of all the covenants and conditions herein contained, and in consideration of the premises and of the purchase and acceptance of such bonds by the holders thereof, and of the sum of one dollar to it duly paid by the trustee at the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged.

The railroad company, party of the first part, has sold, assigned, and transferred, and by these presents does sell, assign, and transfer unto the trustee, party of the second part, its successors and
170 assigns forever, the following shares of stock, the certificates for which in the name of the Erie Railroad Company, but by it endorsed in blank, have been delivered to the trustee, namely:

98,212 shares, of the aggregate par value of $4,910,600 of the capital stock of the Pennsylvania Coal Company, out of the total outstanding capital stock of said company, consisting of 100,000 shares of the par value of $50 each;

30,000 shares, of the aggregate par value of $1,500,000 of the capital stock of the Erie and Wyoming Valley Railroad Company, being all the outstanding capital stock of said corporation;

2,500 shares, of the aggregate par value of $250,000 of the capital stock of the Delaware Valley and Kingston Railroad Company, being all the outstanding capital stock of said corporation;

66,300 shares of the preferred stock, and 66,300 shares of the common stock of the New York, Susquehanna and Western Railroad Company (a corporation existing under the laws of the State of New Jersey), such shares being of the par value of $100 each, and together constituting fifty-one per cent of the outstanding capital stock of said company.

The railway company covenants and agrees that any and all additional shares of the capital stock of the said Pennsylvania Coal Company, the Erie and Wyoming Valley Railroad Company, or of the Delaware Valley and Kingston Railroad Company, and other property of any kind or description whatsoever, which hereafter shall be acquired by the railway company or by the trustee, and which by any covenant or provision of this indenture the railway company has subjected or has agreed to subject to the lien hereof, immediately upon such acquisition, but subject to the terms and conditions of such acquisition thereof, and without any further assignment, transfer, or conveyance, shall become and be subject to the lien of this indenture as fully and completely as though expressly and specifically assigned, transferred, and conveyed to the trustee under this indenture; but the railroad company covenants and agrees that at any and all times it will execute and will deliver to the trustee any and all further assignments, transfers, or conveyances and instruments of further
171 assurance, as the trustee may reasonably direct or require for the purpose of expressly and specifically subjecting such additional shares, bonds, certificates of indebtedness, and other property to the lien of this indenture, and will deliver to the trustee the certifi-

cates for any such shares of stock, and such bonds or certificates of indebtedness.

It is further covenanted and declared, that any other or additional property of any kind, including bonds and other securities, claims, and stocks, from time to time hereafter, may be conveyed, assigned, transferred, or delivered by the railroad company, or by anyone in behalf of the railroad company, with its written consent or approval, to the trustee hereunder, as and for additional security for the bonds issued and to be issued hereunder, and the trustee shall receive, hold, and apply any and all such property subject to the trusts of this indenture; but any such conveyance, assignment, transfer, or delivery, pursuant to the provisions of this clause, as and for additional security, may be made subject to any reservations, limitations, conditions, and provisions which shall be set forth in an instrument in writing, then executed by the trustee and by the railroad company, pursuant to the provisions of this clause, as and for additional property and the proceeds thereof.

But it is hereby expressly declared that there is reserved to and by the railroad company the right to acquire any properties (including stocks, bonds and other securities), and to hold and to dispose of the same free from the lien of this indenture, provided that neither any bonds hereby secured and reserved under section 3 of article one hereof nor the proceeds of any such bonds so reserved, and no bonds, stocks, or other property or moneys held by the trustee hereunder shall be used for such acquisition, or to reimburse the railroad company in respect thereof.

172 To have and to hold the said shares of stock hereby assigned and transferred, and also all additional property of any kind, including shares of stock, bonds and other securities, certificates of indebtedness and claims, which hereafter shall become subject to this indenture, unto the trustee, its successors and assigns forever:

But in trust, nevertheless, for the equal and proportionate benefit and security of all present and future holders of the bonds and interest obligations issued and to be issued under and secured by this indenture, and for the enforcement of the payment of said bonds and interest obligations, when payable, and the performance of, and compliance with, the covenants and conditions of this indenture, without any preference, priority, or distinction, as to lien or otherwise, of any one bond over any other bond by reason of priority in the issue or negotiation thereof; so that each and every bond, issued and to be issued as aforesaid, shall have the same right, lien, and privilege under this indenture, and that the principal and interest of every such bond shall, subject to the terms hereof, be equally and proportionately secured hereby as if all had been made, issued, and negotiated simultaneously with the execution and delivery of this indenture; it being intended that the lien and security of this indenture shall take effect from the day of the date hereof, without regard to the date of actual issue, sale, or disposition of said bonds, as

ugh, upon such day, all of said bonds were actually issued, sold, l delivered to holders for value:

And it is hereby covenanted and declared, that the property sub- t to this indenture is to be held by the trustee, and that all such nds, with the coupons for interest thereon, are to be issued and eived, subject to the further covenants, conditions, and trusts here- inafter set forth, to wit:

3 ARTICLE ONE.

SECTION 1. From time to time the bonds to be secured hereby shall executed by the railroad company, and by it shall be delivered for tification to the trustee, and thereupon, as provided in this article, l not otherwise, the trustee shall certify and shall deliver the same the option of the railroad company from time to time.

Any of such bonds may be executed, certified, and delivered origi- lly either as coupon bonds or as registered bonds.

The amount of bonds hereby secured which may be executed by the lroad company and which may be certified by the trustee is limited that never at any time shall there be outstanding bonds hereby ured for an aggregate principal sum exceeding thirty-six million llars ($36,000,000).

Before certifying or delivering any coupon bond hereby secured e trustee shall detach and shall cancel all coupons thereof then tured; and every registered bond shall be dated on the day of the ual certification thereof.

Only such bonds as shall bear thereon a certificate, substantially the form hereinbefore recited, duly executed by the trustee, shall secured by this indenture, or shall be entitled to any lien or benefit reunder. Every such certificate of the trustee upon any bond ecuted by the railroad company shall be the conclusive and the only idence that the bond so certified was duly issued hereunder and is itled to the benefit of the trust hereby created.

SEC. 2. Of the bonds authorized to be issued under and secured by s indenture, bonds for the aggregate principal sum of $32,000,000 ll be certified by the trustee and returned to the railroad company, upon the order of its president, immediately upon the execution this indenture, or as soon thereafter as may be. The railroad com- ny hereby covenanting that it will use and issue such $32,000,000 bonds only in payment on account of the acquisition of shares 4 of stock of the Pennsylvania Coal Company or of the Erie and Wyoming Valley Railroad Company or the Delaware lley and Kingston Railroad Company, all of which shares as and en acquired shall be pledged hereunder, and the certificates there- delivered hereunder to the trustee, which, however, shall not be nd to see to such application or use of such bonds.

SEC. 3. Four million dollars ($4,000,000), par value of the bonds horized to be issued under and secured by this indenture, shall be erved to be executed by the railroad company, and to be certified

and delivered by the trustee, from time to time, for some one or more of the following purposes, but only as hereinafter provided and subject to the restrictions hereinafter stated:

I. The purposes for which such $4,000,000 of bonds shall be executed, certified, and delivered and for which such bonds or their proceeds may be used, are:

(a) To make betterments or improvements of or upon any property which at the time of issuing the bonds reserved under this section 3 shall be subject to the lien of this indenture, and to construct or acquire additional mines, collieries, coal lands, or coal leases, and additional lines of railway, extensions, branches, bridges, shops, depots, terminal properties, power houses, electrical plant, rolling stock, or other additional property connected with or for use in connection with any of the mines or collieries or lines of railway, extensions, branches, shops, depots, terminal properties, power houses, electrical plant, rolling stock, bridges, or other properties which at the time of such construction or acquisition either shall be subject to the lien of this indenture or shall belong to any company of whose capital stock at least ninety per cent shall be held by the trustee under this indenture; and to provide the railroad company with funds for expenditures by it made or incurred for any of the foregoing purposes;

175 (b) To furnish moneys, or to reimburse the railroad company for moneys furnished, to any other such company or companies of whose capital stock not less than ninety per cent in amounts shall then be held hereunder by the trustee, to an amount not exceeding expenditures by such company or companies made or incurred for the construction or acquisition of betterments or improvements of, or additional, mines, collieries, coal lands or coal leases, or additional lines of railway, extensions, branches, bridges, shops, depots, terminal properties, power houses, electrical plant, rolling stock or other additional property connected with, or for use in connection with mines, collieries, coal lands or coal leases or any of the lines of railway, extensions, branches, shops, depots, terminal properties, power houses, electrical plant, rolling stock, bridges, or other property which at the time of such construction or acquisition shall belong to such other company or companies; provided, that in every such case the railroad company shall *f*require such other company or companies to issue, and shall pledge or shall cause to be pledged with the trustee hereunder, bonds or certificates of indebtedness or paid-up shares of the capital stock of such other company or companies of a par amount at least equal to the amount of the moneys so furnished; and,

(c) To acquire, or to reimburse the railroad company for the acquisition of, the shares of the capital stock, bonds and indebtedness of any company which at the time of such acquisition shall own any mine or colliery, coal lands or coal leases, or any line of railway, extension, branch, bridge, terminal property, power house, electrical plant, connected with, or available for use in connection with, any mine or colliery, coal lands or coal leaseholds, or any line of railway owned by any company of whose capital stock the greater

part shall then be held by the trustee hereunder; provided, that thereby not less than ninety per cent of all the shares of the
176 capital stock of such company shall be obtained, or previously shall have been obtained and pledged hereunder; and provided further, that no shares or bonds or indebtedness issued or created by any such company after a majority in amount of the outstanding shares of the capital stock of such company shall have been pledged hereunder shall be acquired under this clause (c), but the same may be acquired under clause (b) of this section.

II. The restrictions subject to which such $4,000,000 of reserved bonds from time to time shall be certified and delivered are as follows:

(1) Before certifying and delivering bonds under this section, there shall be delivered to the trustee a copy of a resolution of the board of directors of the railroad company, certified by its secretary or assistant secretary, calling for the certification and delivery of such bonds, and directing the officers of the railroad company to set aside such bonds and their proceeds separate and apart from any other assets and funds of the railroad company, and to use the same only as authorized by this section.

(2) From time to time, when and as requested by the president of the railroad company, upon the presentation to the trustee of the copy of any such resolution as above provided, there shall be so certified and delivered such amount of the bonds reserved under this section, not in any one delivery exceeding, in the aggregate, $1,000,000 par value, as from time to time shall be called for in such resolutions. But, in every instance before certifying and delivering any of the bonds reserved under this section (except the $1,000,000 thereof first deliverable hereunder), the trustee shall require the railroad company to furnish, in addition to such resolution of its board of directors, the certificate or certificates of some one or more officers of the railroad company, stating:

177 (a) That all bonds, theretofore certified and delivered under this section in respect of which no such certificate previously shall have been furnished, and the proceeds of all such bonds, have been actually used for the said purposes, or for some one or more of them, or to reimburse the railroad company as aforesaid—indicating the particular mines, collieries, coal lands and coal leaseholds and the lines of railway, extensions, branches, bridges, shops, depots, terminal properties, rolling stock or other additional property, and the kind or class of betterments or improvements constructed, acquired or made, and the stocks, bonds or indebtedness acquired, and the sums furnished to any such other company or companies, and the amount and description of the shares of capital stock, bonds or certificates of indebtedness of such other company or companies received by the railroad company on account thereof;

(b) That the price paid for such construction or for such acquisition, betterments or improvements was not in excess of the fair value

of the property acquired or work done, and that the bonds included in such certificate were sold, disposed of or otherwise accounted for at not less than their fair value at the time of such sale, disposition or accounting;

(c) That no part of such expenditures so certified was included in any previous certificate furnished hereunder, or was made or reimbursed out of any bonds or moneys received by the railroad company under any other provision of this indenture;

(d) That no part of the expenditures in such certificate so certified was included in the operating or maintenance expenses reported in any annual report theretofore issued by the railroad company;

(e) In case such certificate shall show the acquisition of new
178 property, then such certificate also shall state whether such new property is known or is believed to be subject to any lien or charge prior to this indenture, except undetermined liens or charges incident to construction; and such certificate shall specify the amount of any such prior lien or charge (other than as aforesaid) known or believed to exist. In case the certificate shall show the acquisition of any shares of the capital stock, bonds or other indebtedness of any other company, such certificate shall state whether the property of such other company is known or is believed to be subject to any lien or charge, and whether such company is known or is believed to have any indebtedness except ordinary operating accounts and undetermined claims, liens and charges incidental to construction, and except also indebtedness to the railroad company and liens, charges and indebtedness transferred to the trustee or in respect of which bonds shall have been set apart under the following clause (3), and such certificate in each case shall specify the amount of any such lien, charge or indebtedness known or believed to exist;

(f) Any such certificate under this section may state any other facts pertaining to the right to certify and deliver bonds hereunder. The same officer or officers of the railroad company need not certify to all the facts required to be certified under the provisions of this section, but different officers may certify to different facts respectively.

(3) After delivery of the $1,000,000 of bonds first deliverable hereunder, no bonds shall be certified and delivered under this section, for or in respect of the construction or acquisition of property subject to any such certified lien or charge, or for or in respect of the acquisition of shares of capital stock, bonds or indebtedness of a com-
179 pany subject to indebtedness so certified, or whose property is subject to a lien or charge so certified, unless or until the railroad company shall have deposited with the trustee an amount of the bonds hereby secured of a par amount equal to the aggregate amount of such certified indebtedness, liens and charges. Whenever thereafter any of such certified indebtedness, liens and charges shall be paid or satisfied, or shall be acquired and be subjected to the lien hereof, then an equal amount at par of the bonds hereby secured so deposited with the trustee under this clause shall be redelivered by the trustee to the railroad company or upon its order, so that the amount of such bonds

held by the trustee under this clause at all times shall be equal to the amount of such indebt'ness, liens and charges remaining unsatisfied or not subjected to the lien hereof.

(4) The railroad company covenants that whenever all the bonds reserved under this section shall have been certified and delivered to and used by the railroad company, it will execute and deliver to the trustee a similar certificate indicating the particular application of all bonds or proceeds of bonds, in respect of which the railroad company shall not theretofore have furnished such certificate to the trustee.

(5) Every such certificate furnished under this section, unless signed, first, by the president or a vice-president or the general manager or the chief engineer, and, secondly, by the comptroller or auditor or treasurer of the railroad company, shall have endorsed thereon, or shall be accompanied by a written statement of one of the officers first above designated, and one of the officers secondly above designated, that they believe that such certificate is true, and that such bonds have been used and the expenditures certified have been made only for purposes authorized by this section. A certificate signed by one of the officers first above designated and one of the officers secondly above designated or having endorsed thereon, or being accompanied by a written statement of said officers as above provided may be received by the trustee as conclusive evidence of any facts pertaining to the right to certify and deliver bonds pursuant to this section.

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Together with such statements and certificates there shall be delivered to the trustee any such bonds so acquired, and the certificates endorsed for transfer in blank for any such shares of stock so acquired, and any conveyances or instruments of further assurance that may be necessary for the purpose of effectually subjecting to the lien and operation of this indenture any new property so acquired by the railroad company, and, so far as may be, any indebtedness, liens, or charges so taken up or acquired by use of said bonds, and also the written opinion of counsel for the railroad company to the effect that such conveyances or other instruments are sufficient for that purpose or that no conveyance or instrument of further assurance is necessary for the purpose aforesaid. Such resolutions, statements, certificates, and opinion shall be deemed, and shall be taken to be, full authority and protection to the trustee for its certification of such bonds under the foregoing provisions of this section.

The railroad company covenants that when all the bonds reserved under this section 3 shall have been certified and delivered to and used by the railroad company it will execute and deliver to the trustee a similar certificate indicating the purposes for which the railroad company shall have used all bonds or the proceeds of all the bonds in respect of which the railroad company shall not theretofore have furnished such certificate to the trustee.

SEC. 4. Whenever under section 3 of this article the railroad company shall be entitled to bonds hereby secured, or their proceeds, the

railroad company may take and accept such bonds at a price not less than their average market price during the previous cal-
181 endar month. Any bonds so taken and accepted by the railroad company in reimbursement for expenses theretofore actually made by the railroad company shall be held and may be used by the railroad company for its general corporate purposes freed and discharged from all restrictions and provisions of said section 3 as though such bonds had been sold at such price and the proceeds paid over to the railroad company.

SEC. 5. Whenever any coupon bond or bonds, issued under and secured by this indenture, together with all unmatured coupons thereto beolnging, shall be surrendered for exchange for registered bonds without coupons, the railroad company shall execute, and the trustee shall certify, and in exchange for such coupon bond or bonds shall deliver registered bonds, or one registered bond, without coupons, for the like aggregate principal sum. Such registered bonds shall bear interest at the same rate as the surrendered coupon bonds, and from the date of the last-matured coupon thereof. In every case of such exchange the trustee forthwith shall cancel the surrendered bond or bonds and coupons, and shall deliver the same to the railroad company.

Whenever any registered bond without coupons shall be surrendered, transferred, and cancelled, the railroad company shall issue, and the trustee shall certify and deliver, to the transferee, registered bonds, or one registered bond, without coupons, for a like aggregate principal sum.

Whenever any registered bond without coupons shall be surrendered for exchange for a coupon bond or bonds, then upon cancellation of such surrendered bond and payment of the charges therefor, the railroad company shall issue, and the trustee shall certify and deliver, in exchange therefor, coupon bonds for the like aggregate principal sum, having attached thereto the coupons maturing on and after the date when the next semiannual instalment of interest would have matured on such surrendered registered bond without coupons.

182 For any exchange of coupon bonds for registered bonds, and (2) for any transfer of registered bonds without coupons, and (3) for any exchange of registered bonds without coupons for coupon bonds, the railroad company, at its option, may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge required to be paid, and also of the further sum of one dollar for each new coupon bond or registered bond without coupons issued upon any such exchange or transfer.

SEC. 6. In case any coupon bond issued hereunder with the coupons thereto appertaining, or any registered bond without coupons, shall become mutilated or be destroyed, the railroad company, in its discretion, may execute, and thereupon the trustee shall certify and deliver, a new bond of like tenor and date (including coupons in case of a coupon bond) bearing the same serial number, in exchange and

substitution for and upon cancellation of the mutilated coupon bond and its coupons, or the mutilated registered bond, or in lieu of, and substitution for, the coupon bond and its coupons, or the registered bond so destroyed, upon receipt of satisfactory evidence of the destruction of such coupon bond and its coupons, or of such registered bond, and upon receipt also of satisfactory indemnity.

SEC. 7. Nothing in this article, or in any other article of this indenture, or in the bonds issued hereunder, expressed or implied, is intended, or shall be construed to give to any person or corporation, other than the parties hereto and the holders of bonds issued under and secured by this indenture, any legal or equitable right, remedy, or claim under or in respect of this indenture, or under any covenant, condition, or provision herein contained; all its covenants, conditions, and provisions being intended to be, and being, for the sole and exclusive benefit of the parties hereto and of the holders of the bonds hereby secured.

183 ARTICLE TWO.

The railroad company covenants as follows:

SECTION 1. Duly and punctually it will pay the principal and interest of every bond issued and secured hereunder at the dates and the place and in the manner mentioned in such bond, or in the coupons thereto belonging, without deduction from either principal or interest, for any taxes imposed by the United States or any State or county or municipality thereof, which the railroad company may be required to pay or to retain therefrom under or by reason of any present or future law. The interest on the coupon bonds shall be payable only upon presentation and surrender of the several coupons for such interest as they respectively mature, and when paid such coupons shall forthwith be canceled. The principal of each coupon bond shall be payable only upon presentation and surrender of the bond. The interest on the registered bonds without coupons shall be payable only to the registered holders thereof. The principal of each registered bond without coupons shall be payable to the person registered as holder of such bond at the time of payment, but only upon presentation and surrender of such bond.

At all times, until the payment of the principal of the bonds secured by this indenture, the railroad company will keep an office or agency in the city of New York where bonds and coupons may be presented for payment, and where notices or demands in respect of said bonds and coupons may be served, and from time to time the railroad company will give written notice to the trustee of the place of such office or agency. In case the railroad company shall fail to do so, presentation and demand may be made and notices served at the office of the trustee in the city of New York.

184 SEC. 2. Whenever demanded by the trustee, the railroad company will do, execute, acknowledge and deliver, or will cause to be done, executed, acknowledged and delivered, all such further

acts, deeds, transfers, and assurances for the better assuring, conveying and confirming unto the trustee all and singular the premises and property hereby assigned, pledged, or mortgaged, or intended so to be, or which the railroad company herein has covenanted and agreed hereafter to assign, pledge, or mortgage, as the trustee shall reasonably require for better accomplishing the provisions and purposes of this indenture and for securing the payment of the principal and interest of the bonds intended to be secured hereby.

SEC. 3. The railroad company, at an office or agency to be maintained by it in the city of New York, will keep a register or registers for the registration and transfer of bonds issued hereunder, in which it will register, subject to such reasonable regulations as it may prescribe, bonds without coupons, and upon presentation thereof for such purpose any coupon bonds issued hereunder. Such register, at all reasonable times, shall be open to the inspection of the trustee.

Upon presentation to the railroad company, at the place where such register shall be kept, of any such registered coupon bond, accompanied by delivery of a written instrument of transfer in a form approved by the railroad company, executed by the registered holder, such bond shall be transferred upon such register, and such transfer shall be noted by the railroad company upon such bond. The registered holder of any such registered coupon bond also shall have the right to cause the same to be registered as payable to bearer, in which case transferability by delivery shall be restored, and thereafter the principal of such bond when due shall be payable to the person
185 presenting the bond; but any such coupon bond registered as payable to bearer may be registered again in the name of the holder with the same effect as a first registration thereof. Successive registrations and transfers as aforesaid may be made from time to time as desired; and each registration of a coupon bond shall be noted by the railroad company on the bond.

Registration of any coupon bond, however, shall not restrain the negotiability of any coupon thereto belonging, but every such coupon shall continue to pass by delivery merely, and shall remain payable to bearer.

Any registered bond without coupons may be transferred at said office or agency by surrender of such bond to the railroad company for cancellation, accompanied by the delivery of a written instrument of transfer in a form approved by the railroad company, duly executed by the registered holder for the time being, and by payment of any charge imposed under section 5 of article one hereof; and thereupon a new registered bond or new registered bonds for an equivalent aggregate principal sum shall be issued to the transferee or transferees, as provided in said section 4 of article one.

SEC. 4. The railroad company will not voluntarily create or suffer to be created any debt, lien, or charge which would be prior to the lien of these presents upon any property which shall have become subject to this indenture, or any part thereof, or upon the income thereof, and, within three months after the same shall accrue, it will

pay, or will cause to be discharged, or will make adequate provision to satisfy and discharge, all lawful claims and demands of mechanics, laborers, or others which, if unpaid, might by law be given precedence to this indenture as a lien or charge upon such property or any
186 part thereof, or the income thereof; and if any company (other than the New York, Susquehanna and Western Railroad Company), of whose capital stock the greater part shall have been pledged hereunder, at any time while the greater part of the capital stock of such company shall be pledged hereunder, shall voluntarily create, or shall suffer to be created (except as in this indenture expressly permitted), any new lien or charge upon its property or income, or shall create, or shall suffer to be created, any new indebtedness other than indebtedness to the railroad company, or indebtedness for the current expenses of such company during a period not exceeding three months, then it (the railroad company) will acquire such lien, charge, or indebtedness and cause the same to be vested in the trustee, or will cause the same to be paid or discharged, or will make adequate provision for the satisfaction or discharge thereof; provided that nothing in this section contained shall require the railroad company to acquire, or cause to be paid or discharged or make provision for, any such debt, lien, or charge so long as the validity thereof in good faith shall be contested.

SEC. 5. The railroad company from time to time will pay and discharge all taxes, assessments, and governmental charges (the lien of which would be prior to the lien hereof) lawfully imposed upon the stocks, bonds, and other property pledged or mortgaged hereunder, or upon any part thereof, or upon the income and profits thereof, and also all taxes, assessments, and governmental charges lawfully imposed upon the lien or interest under this indenture of the trustee or of the holders of the bonds hereby secured in respect of such stocks, bonds, and other property, so that the lien and priority of this indenture shall be fully preserved at the cost of the railroad company without expense to the trustee or the bondholders; and if any company of whose capital stock the greater part shall have been acquired and pledged hereunder, at any time while a greater part of the capital stock of such company shall be pledged hereunder, shall fail to
187 pay all taxes, assessment, and charges lawfully imposed upon the property of such company or upon the income and profits thereof, then it, the railroad company, either will pay the same or will acquire and will transfer to the trustee the claim therefor, or will make adequate provision for the satisfaction or discharge thereof: Provided, however, That nothing in this section contained shall require the railroad company to pay, acquire, or make provision for any such tax, assessment, or charge so long as in good faith the railroad company shall contest the validity thereof.

SEC. 6. Except as in this indenture expressly authorized, the railroad company will not by affirmative vote or consent, or by abstaining from voting, sanction, or permit any increase of the capital stock of any company of whose capital stock the greater part shall be sub-

ject to this indenture, or the issue or the guaranty of any new bond by any such company, or the creation of any new indebtedness of any such company (except current operating accounts for a period not a any date exceeding six months prior thereto), or the creation of any new mortgage or other lien upon the railroad or property of any such company, unless simultaneously there shall be effective provision tha such new indebtedness, and the evidences thereof and such new bond issued or guaranteed, and such new mortgage or other lien, and al such additional stock (or such part of such additional stock as shal be proportionate to the part of such entire capital stock previously pledged hereunder) forthwith, upon the issue or creation thereof shall be transferred to or pledged with the trustee, by it to be held subject to all the trusts of this indenture; and all such additiona stock shall be fully paid and non-assessable.

188 Except as in this indenture expressly authorized, the railroad company will not, by affirmative vote or consent, or by abstaining from voting, sanction or permit any company, of whose capital stock the greater part shall be subject to this indenture, to sell or otherwise to dispose of, any mine, colliery, railroad or bridge belonging to such company, unless the operation thereof be abandoned, or any property required for such operation, or to lease the same (unless such lease be upon the express condition that it shall terminate at the election of the trustee in case any default shall be made and shall continue as provided in section 2 of article four hereof), except to the railroad company or to some other company of whose capital stock not less than ninety per cent. shall then be held by the railroad company and be pledged with the trustee hereunder.

SEC. 7. Any and all claims or indebtedness, which the railroad company hereafter may acquire against any other company, of whose capital stock the greater part shall have been pledged or assigned to the trustee hereunder, shall (subject to the provisions in respect thereof in this indenture contained) be and become subject to the lien of this indenture; and, if and when requested in writing by the trustee, the railroad company will execute to the trustee appropriate assignments thereof.

SEC. 8. The railroad company will not issue, negotiate, sell or dispose of any bonds hereby secured in any manner other than in accordance with the provisions of this indenture and the agreements in that behalf herein contained; and in issuing, selling, negotiating or otherwise disposing of such bonds, from time to time, it will well and truly apply, or cause to be applied, the same, or the proceeds thereof, only to and for the purposes herein prescribed, and to and for no other or different purpose.

189 SEC. 9. In each and every year after the year 1901 during the month of May the railroad company will deliver to the trustee and also to the copartnership firm of J. P. Morgan & Co., bankers in the city of New York, as sinking fund trustees hereunder, a statement in writing under its corporate seal, showing the total amount of coal sold and delivered during the preceding calendar year from the mines

of the Pennsylvania Coal Company; and simultaneously it will pay to the said copartnership firm of J. P. Morgan & Co., as sinking fund trustees hereunder, a sum equal to ten cents for every ton of coal so sold and delivered. The moneys so received, together with all accumulations of interest thereon, as hereinafter provided, shall be appropriated to, and shall constitute, a sinking-fund, as additional security for the retirement of every bond of this issue at or before the stated maturity thereof.

The moneys paid or coming into the sinking fund shall by the said firm of J. P. Morgan & Co., sinking fund trustees, be held as bankers; and from time to time the said sinking fund, together with any accumulations of interest thereon, shall by them be invested in bonds hereby secured, by the purchase thereof in such manner as to them shall seem best, and at such prices as they shall deem best, not exceeding par and accrued interest, with five per cent. premium added to the principal.

To the extent that, in the opinion of the sinking fund trustees, bonds hereby secured can not be purchased on said terms, the sinking fund trustees may and shall proceed to draw and to designate by lot, bonds hereby secured to an aggregate amount sufficient at the valuations above prescribed to exhaust the net moneys paid by the railroad company under the provisions of this section, and all accumulations of interest thereon and then in possession of the sinking fund trustees and available for the redemption of the bonds so designated.

190 The numbers of all bonds so designated and drawn shall be published as directed by the sinking fund trustees, twice in each week for three successive weeks in the month of January or the month of July, in two or more newspapers published in the city of New York, with a notice that upon presentation thereof to the sinking fund trustees, every such bond will be paid at par, together with a premium of five per cent. thereof and all interest accrued thereon upon the first day of the following month of February or of August, as the case may be; and after such day so designated no interest shall thereafter accrue or be payable upon, or in respect of, any bond so designated and notified, nor shall any coupon representing any such subsequently accruing interest be of any force or effect. But, to the extent of any moneys at any time thereafter in their possession, upon receipt of any such bond so designated and notified, and not presented before the day so designated, together with all coupons (if any) belonging thereto for interest accruing after such designated day, the sinking fund trustees may receive the same, and may pay therefor a sum equal to par together with a premium of five per cent. thereof and all interest accrued thereon up to the date so designated.

All of the bonds hereby secured, which shall be called or purchased, as aforesaid, shall, as soon as received by the sinking fund trustees, be conspicuously and indelibly stamped on the face thereof, as "Received for the sinking fund, and no longer negotiable or transferable," and the date of the receipt thereof by the sinking fund trustees shall also be plainly noted thereon; and the coupons thereto belonging shall be

defaced or canceled by perforations or punctures through the name of the treasurer; or the sinking fund trustees may exchange any coupon bond for a registered bond or bonds without coupons, for the like aggregate principal sum, as permitted by section 5 of article one of this indenture; and, in case of such exchange, every such registered bond so received shall be stamped "Received for the sinking fund and no longer transferable."

191 All coupon bonds or registered bonds so received by the sinking fund trustees shall be held by them for the sinking fund. All of the bonds hereby secured, which shall come into or be received for the sinking fund, shall remain in force as valid obligations, as an investment of and for the sinking fund, but for no other purpose; and the semi-annual interest thereon, as the same shall mature, shall be payable, and shall continue to be paid by the railroad company to the sinking fund trustees, in the same manner and at the same times as such payments of interest would be made if the said bonds were held and owned by any other corporation or person, and the amount of such interest shall be added to and deposited and shall be applied as a part of the sinking fund, in the manner, and with the limitations hereinbefore provided in respect of the deposit and investment of other moneys paid or coming into the sinking fund and the accumulations thereof.

When all of the bonds secured by this indenture shall have been paid, or shall have been called or designated for acquisition for the sinking fund, as hereinbefore provided, all of the said bonds that shall have been acquired or held for the sinking fund shall by the sinking fund trustees be canceled and delivered to the railroad company, together with all coupons (if any) thereto belonging; and the sinking fund trustees shall also pay over and deliver to the railroad company all moneys and securities for money then in or belonging to the sinking fund; but not without making ample provision, or taking adequate security, for the payment of the principal at or before the maturity of any of the said bonds that shall have been called for the sinking fund, as hereinbefore provided, and shall not have been presented and delivered in pursuance of such call.

No registered bond without coupons shall be drawn so long as any coupon bond is outstanding and unpaid.

192 As sinking fund trustees, J. P. Morgan & Co. shall act as a copartnership. Notwithstanding any change in said firm, J. P. Morgan & Co., as from time to time constituted, shall continue to be sinking fund trustees, with all the powers, right, and title vested hereunder in the sinking fund trustees. But in case of any change in said firm, the railroad company and the trustee, by an instrument in writing under the corporate seals of the trustee and of the railroad company may appoint to be sinking fund trustee in place and in lieu of J. P. Morgan & Co. some trust company in good standing, doing business in the city of New York and having a capital and surplus aggregating at least $1,000,000. Thereupon the firm of J. P. Morgan & Co., as then constituted, shall execute and deliver an instru-

ment transferring to such sinking fund trustee all of the estates, properties, rights, powers, and duties of the said J. P. Morgan & Co. as sinking fund trustees, and shall duly transfer and deliver to the new sinking fund trustee so appointed in their place all bonds and other property and moneys held by them as such sinking fund trustees after deducting therefrom their reasonable costs and charges then remaining unpaid. Without any further act, deed, or conveyance, such new sinking fund trustee forthwith shall become and be vested with all the properties, rights, powers, trusts, duties, and obligations of J. P. Morgan & Co. as sinking fund trustees hereunder, with like effect if originally named herein as sinking fund trustee.

Neither J. P. Morgan & Co., nor any successor, as sinking fund trustees, shall be answerable for the default or misconduct of any agent or attorney appointed by them in pursuance hereof, if such agent or attorney shall have been selected with reasonable care, or for anything whatever in connection with such sinking fund except willful misconduct and gross negligence. The sinking fund trustees shall be entitled to a reasonable compensation payable primarily by the railroad company and secondarily out of the sinking fund.

193 ARTICLE THREE.

SECTION 1. The trustee shall be authorized to cause to be registered in its name as trustee hereunder any and all coupon bonds pledged with it hereunder, or which at any time hereafter may be pledged with it under any of the provisions of this indenture, or it may cause the same to be exchanged for registered bonds without coupons of any denomination, or it may cause any such bonds to be stamped "Nonnegotiable. Held in trust under the collateral trust indenture bearing date February 1, 1901, executed by Erie Railroad Company to The Mercantile Trust Company, as trustee."

The trustee shall cause to be transferred into its name, as trustee hereunder, all registered bonds which shall have been delivered and assigned to it as security hereunder. The trustee at any time may transfer into its name, as trustee hereunder, all or any shares of stock, the certificates for which shall have been pledged with it hereunder.

The trustee may do whatever may be necessary for the purpose of maintaining or preserving the corporate existence of any company the greater part of whose shares shall have been pledged hereunder, and for such purposes, from time to time, it may sell, assign, transfer, and deliver so many shares of the stock of the several companies as may be necessary to qualify persons to act as directors of, or in any other official relation to, said companies; provided, however, that under this provision no transfer shall be made which shall so reduce the amount of stock in any company held by the trustee as to render it less than a controlling interest in such stock; and in every case the trustee may make such arrangements as it shall deem necessary for the protection of the trust hereunder.

SEC. 2. Unless and until there shall be some continuing default (1) in the payment of any interest on any bond or bonds secured by
194 this indenture, and such defaults shall have continued for a period of ninety days, or (2) in the payment of the principal of any bond hereby secured when the same shall have become payable, or (3) in the due observance or performance of any other covenant or condition in this indenture required to be kept or performed by the railroad company, and such last-mentioned default shall have continued for a period of six months after written notice thereof shall have been given by the trustee to the railroad company—(a) the trustee (except upon the request or with the assent of the railroad company) shall not enforce the payment of, or collect, the principal or interest of any bonds or of any other claims or indebtedness now or hereafter subject to this indenture, whether at or before or after the maturity of such bonds or contract obligations or other claims or indebtedness, and shall not enforce any provision of the mortgages, trust deeds, or other instruments under which such bonds or other obligations were issued or by which the same are secured; and (b) the railroad company shall be entitled to receive all interest paid in respect of any such bonds or obligations, and the dividends on all shares of stock which shall be subject to this indenture, although the same shall have been transferred to the trustee; (c) from time to time (subject to the covenants in respect thereof in this section contained), upon the request of the railroad company on a date not more than sixty days prior to the maturity of any coupons, held by the trustee for such interest, the trustee shall deliver such coupons to the railroad company in order that the railroad company may receive payment thereof for its own use, or may cause the same to be canceled, and, upon request of the railroad company on a date not more than sixty days prior to the maturity of any interest or dividends, the trustee shall deliver to the railroad company suitable orders in favor of the railroad company, or its nominee, for the payment of such interest and dividends upon any bonds or shares held by the trustee, and he railroad company may collect such coupons, interest, and divi-
195 dends, but not by any proceeding which the trustee shall deem to be prejudicial to the trusts hereunder, and the trustee at once shall pay over to the railroad company any such interest and dividends which may be collected or be received by it; and (d) the railroad company, for its own use, shall be entitled to demand, collect, and receive, and may release and discharge, the principal and interest of any claims and indebtedness subjected to the lien of this indenture under section 7 of article two hereof, and upon request of the railroad company the trustee shall execute any reassignments or releases which may be required for that purpose.

Provided, however, and hereby it is declared and agreed that, except as in this indenture otherwise expressly provided, (1) the railroad company shall not be entitled to receive, and the trustee shall not pay over to the railroad company, any principal of any bond pledged or assigned to the trustee hereunder; (2) the railroad com-

pany shall not be entitled to receive, and the trustee shall not pay over, any interest on any such bond, or any principal or interest of any such other obligation, claim, or indebtedness which shall have been collected or paid out of the proceeds of any sale of the property covered by a mortgage securing such bonds, or out of the proceeds of the sale of any other property of the company liable upon such bonds, obligations, claims, or indebtedness in case of a dissolution or liquidation of such company; it being the intention that the railroad company shall be entitled to receive payments made only out of the rents, revenues, income, or proceeds of operation of such properties; (3) the railroad company shall not sell, assign, or transfer any such coupon, or right to interest or dividends, delivered or assigned to it, or any other such claim or indebtedness, except subject to this indenture; (4) the railroad company shall not collect any such coupons or interest, or any such other claims or indebtedness, by legal proceeding or by enforcement of any security therefor, except with the assent of
the trustee, nor in any manner which the trustee shall deem
196 prejudicial to the trust hereunder, and (5) until actually paid, released, or discharged, every such coupon, or right to interest or dividends, and such other claims and indebtedness shall remain subject to the lien of this indenture.

If any such coupon, claim or indebtedness shall not be paid or satisfied within sixty days after delivery thereof to the railroad company hereunder, the railroad company shall return the same to the trustee; and in case of the payment or satisfaction of any such coupon, claim, or indebtedness delivered by the trustee to the railroad company hereunder, the railroad company, upon demand of the trustee, shall furnish satisfactory evidence of such payment or satisfaction.

SEC. 3. In case any sum shall be paid on account of the principal of any bonds or of any obligations held by the trustee hereunder, or in case any sum shall be paid on account of the interest on any such bonds or obligations out of the proceeds of a sale of the property covered by a mortgage or trust deed securing such bonds or obligations, or in case, upon the dissolution or liquidation of any company, any sum shall be paid upon any shares of stock of such company pledged hereunder or upon any such claims against or indebtedness of any such company held by the trustee, then, in any such case, any such sum, unless applied on account of the purchase price of property purchased pursuant to section 5 of this article, shall be received by the trustee and shall be paid over by the trustee to the railroad company to reimburse it for expenditures by it made for any one or more of the purposes for which bonds reserved under section 4 of article one hereof or their proceeds may be used, upon certificates of such expenditures, signed by the president or a vice-president, and by the comptroller or auditor or treasurer of the railroad company.

SEC. 4. Unless and until there shall be some continuing default (1)
in the payment of any interest on any bond or bonds secured by
197 this indenture and such default shall have continued for a

period of ninety days; or (2) in the payment of the principal of any bond hereby secured when the same shall have become payable, or (3) in the due observance or performance of any other covenant or condition in this indenture, required to be kept or performed by the railroad company, and such last-mentioned default shall have continued for a period of six months after written notice thereof shall have been given by the trustee to the railroad company—the railroad company shall have the right to vote upon all shares of stock subject to this indenture for all purposes not inconsistent with the provisions or purposes of this indenture, and with the same force and effect as though such shares were not subject hereto; and from time to time, upon demand of the president of the railroad company, the trustee, forthwith, shall execute and deliver to the railroad company or to its nominees suitable powers of attorney or proxies to vote upon any shares of stock which shall have been transferred to the name of the trustee.

SEC. 5. In case default shall be made in the payment of the principal or interest of any of the bonds or obligations which shall have been delivered to, and held by, the trustee hereunder, then in any such case, if the trustee shall hold more than ninety per cent in amount of the entire issue of such bonds or obligations in default, upon the written request of the railroad company, it shall, and in other cases, upon such written request, it may, in its discretion, cause proper proceedings to be instituted and prosecuted in some court of competent jurisdiction to foreclose or enforce the mortgage, or trust, or charge by which such bonds or obligations in default are secured. In case the railroad company shall be in default in the payment of the principal or interest of any of the bonds hereby secured, and such default in the payment of interest shall have continued for a period of ninety days, then the trustee, in its discretion, may institute such proceedings without such written request.

198 In case, at any time, any company of whose capital stock the greater part shall be held by the trustee hereunder shall be dissolved or liquidated, or in case all or any of the property of any such company shall be sold upon the insolvency of such company at any judicial or other sale, or in case any property covered by a mortgage securing any bonds, or subject to any charge or trust for the payment of any other obligations held by the trustee hereunder, shall be sold upon foreclosure of such mortgage, or by enforcement of such charge or trust, then and in every such case (if the property of such company, or the property sold, can be acquired by crediting on the bonds, obligations, claims, indebtedness or shares of stock of such company, held by the trustee hereunder, any sum accruing or to be received thereon out of the proceeds of such property, and paying not more than ten per cent of the price of such property in cash) the trustee, in its discretion, may, but, if by the railroad company requested in writing and provided with the amount of cash necessary therefor (whether such amount be more or be less than ten per cent of the price of such property), the trustee shall purchase, or shall

cause to be purchased, or shall permit the railroad company to purchase, such property, either in the name or on behalf of the trustee or of the railroad company, or by purchasing trustees, and shall use, or shall permit the railroad company to use, such bonds, obligations, claims, indebtedness and stock, so far as may be, to make payment for such property. In case of such purchase the trustee shall take such steps as it may deem proper to cause such property to be vested either in the railroad company, subject to the lien of this indenture, or in some other corporation organized or to be organized, with power to acquire and manage such property, provided that all the outstanding bonds and shares of capital stock of such other corporation (excepting the number of shares required to qualify directors) shall by the trustee be acquired on behalf of the railroad company and be held under this indenture.

199 With the consent of the railroad company at any time the trustee may take such proceedings as in its discretion it shall deem desirable to protect its interests hereunder in respect of any bonds, obligations, or stock subject to the lien hereof, and for that purpose it may join in any plan of reorganization in respect of any such bonds, obligations, or stocks, and may accept new securities issued in exchange therefore under such plan. In case the railroad company shall be in default in the payment of the principal or interest of any of the bonds hereby secured, and such default shall have continued for the period of ninety days, the trustee shall be entitled to take such proceedings without the consent of the railroad company.

The railroad company covenants that, forthwith, on demand of the trustee, it, the railroad company, will pay, or will make satisfactory provision for, all expenditures to be incurred by the trustee under any of the provisions of this section, including all expenditures necessary to obtain and to perfect the ownership and title to any property which pursuant to the provisions of this section the trustee shall purchase or shall cause to be purchased; and in case the railroad company shall fail so to do, then, without impairment of, or prejudice to, any of its rights hereunder by reason of the default of the railroad company, the trustee, in its discretion, may advance all such expenses and other moneys required, or may procure such advances to be made by others, and for such advances made by the trustee, or by others at its request, with interest thereon, the trustee shall have a lien prior to that under this indenture upon the bonds, obligations, claims, indebtedness, or stock in respect of which such advances shall have been made, and upon the proceeds thereof and upon any property acquired by means of such bonds, obligations, claims, indebtedness, or stock.

In case the trustee shall not purchase or cause to be purchased
200 the property sold at any such sale, and shall not join in a plan of reorganization as aforesaid in respect of such bonds, obligations, or stock, then the trustee shall receive any portion of the proceeds of the sale accruing on the bonds, obligations, and stock by it held hereunder, and from time to time such proceeds shall be paid

over to the railroad company to reimburse it for expenditures which shall have been made by it for any purpose for which bonds or their proceeds may be used under section 3 of article one hereof, upon certificates of such expenditures signed by the president or a vice-president and by the comptroller or auditor or treasurer of the railroad company.

SEC. 6. Anything in this indenture to the contrary notwithstanding, any company of whose shares of capital stock the larger part shall be held by the trustee hereunder may be merged or consolidated with, or all or any part of the property of any such company may be sold to, the railroad company or with or to any other company of whose capital stock at least ninety per cent in amount shall then be held by the trustee hereunder;

Provided, however, (1) that in case of a merger or consolidation with, or sale or conveyance to, the railroad company, the property of such company, or the property sold or conveyed, shall become and be subject to the lien of this indenture, free from any prior charge except to secure bonds then held by the trustees or by the trust company hereunder, and shall be vested in the trustees; and (2) that in case of a merger or consolidation with, or sale or conveyance to, any company other than the railroad company, all the shares of capital stock (except the number of shares required to qualify directors) and all the bonded indebtedness and other obligations of such consolidated company or company into which such other company shall have been merged (except current operating liabilities) shall continue to be held by the trustee, notwithstanding such merger, consolida-
201 tion, sale, or conveyance. The trustee may make any exchange, substitution, cancellation, or surrender of securities required for the purposes or in accomplishment of any such merger or consolidation; and the trustee may receive the opinion of any counsel approved by it as to the legal effect of any such merger or consolidation, and as to the steps necessary to be taken to consummate the same, and as to any other matter under this section; and such opinion shall be full protection to the trustee for any action by it taken pursuant thereto.

SEC. 7. At any time in its discretion the trustee may, and, if requested in writing by the railroad company, the trustee shall, consent to the extension or renewal of any bonds or obligations now held, or which hereafter shall be held by the trustee hereunder; provided that the mortgage and lien securing such bonds or obligations shall continue unimpaired notwithstanding such extension. The trustee may receive the opinion of any counsel approved by it as conclusive evidence that any such extension is in compliance with the provisions of this section.

ARTICLE FOUR.

SECTION 1. Neither any coupon belonging to any bond hereby secured, nor any claim for interest on any registered bond which in any way, at or after maturity, shall have been transferred or pledged

separate and apart from the bond to which it relates, shall, unless accompanied by such bond, be entitled, in case of a default hereunder, to any benefit of or from this indenture, except after the prior payment in full of the principal of the bonds issued hereunder, and of all coupons and interest obligations not so transferred or pledged.

SEC. 2. In case (1) default shall be made in the payment of any interest on any bond or bonds secured by this indenture, and any such default shall continue for a period of ninety days, or in case (2) default shall be made in the due and punctual payment of the principal of any bond hereby secured, or in case (3) default shall be made in the due observance or performance of any other covenant or condition herein required to be kept or performed by the railroad company, and any such last-mentioned default shall continue for a period of six months after written notice thereof shall be given to the railroad company by the trustee or by the holders of five per cent in amount of the bonds hereby secured—then and in every such case the trustee, by any officer, attorney, or agent, appointed by it therefor, shall be entitled to vote on all shares of stock then held by the trustee hereunder, and shall be entitled to receive and collect all dividends and all interest moneys maturing or payable upon any and all stocks and bonds then held by the trustee hereunder, and the trustee shall be entitled, by its attorneys or agents, to enter into and upon all or any property and premises, rights and interests conveyed or mortgaged to the trustee hereunder, and may exclude the railroad company, its agents and servants, wholly therefrom, and, having and holding the same, may use, operate, manage, and control the same and conduct the business thereof, by its superintendents, managers, receivers, agents, and servants, to the best advantage of the holders of the bonds hereby secured; and, at the expense of the trust estate, the trustee may administer and manage the same as it may deem to the best advantage of the holders of said bonds. After deducting all expenses incurred under this section and any other expenses of the trust hereunder, the trustee shall apply all moneys collected or received by it hereunder as follows:

In case the principal of the bonds hereby secured shall not have become due, to the payment of the interest in default, in the order of the maturity of the installments of such interest, with interest thereon at the rate of four per cent per annum; such payments to be made ratably to the persons entitled thereto, without discrimination or preference; and

In case the principal of the bonds hereby secured shall have become due, by declaration or otherwise, first to the payment of the accrued interest (with interest on the overdue installments thereof at the rate of four per cent per anum) in the order of the maturity of the installments, and next to the payment of the principal of all bonds hereby secured; in every instance such payments to be made ratably to the persons entitled to such payment without any discrimination or preference.

These provisions, however, are not intended in anywise to modify the provisions of section 1 of this article four, but are subject thereto.

SEC. 3. In case default shall be made in the payment of any interest on any bond or bonds hereby secured, and any such default shall continue for a period of six months, then and in every case of such continuing default, the holders of a majority in amount of the bonds hereby secured then outstanding, by notice in writing delivered to the railroad company and to the trustee, may declare the principal of all bonds hereby secured and then outstanding to be due and payable immediately, and upon any such declaration the same shall become and be immediately due and payable, anything in this indenture or in said bonds contained to the contrary notwithstanding. This provision, however, is subject to the condition that if, at any time after the principal of said bonds shall have been so declared due and payable, all arrears of interest upon all such bonds, with interest at the rate of four per cent per annum on overdue installments of interest, shall either be paid by the railroad company or be collected out of the mortgaged premises before any sale of the mortgaged premises shall have been made, then and in every such case the holders of a majority in amount of the bonds hereby
204 secured then outstanding, by written notice to the railroad company and to the trustee, may rescind and annul such declaration and its consequences; but no such rescission and annulment shall extend to, or shall affect any subsequent default, or impair any right consequent thereon.

In case the trustees shall have proceeded to enforce any right under this indenture, by foreclosure, entry, or otherwise, and such proceedings shall have been discontinued or abandoned because of such waiver, or for any other reason, or shall have been determined adversely to the trustee, then and in every such case the railroad company and the trustee shall be restored respectively to their several positions and rights hereunder in respect of the mortgaged premises, and the shares of stock and the bonds and other property herein pledged or agreed to be pledged; and all rights, remedies, and powers of the trustee shall continue as though no such proceeding had been taken.

SEC. 4. In case (1) default shall be made in the payment of any interest on any bond at any time issued under and secured by this indenture, and any such default shall continue for a period of ninety days; or in case (2) default shall be made in the due and punctual payment of the principal of any bond hereby secured; or in case (3) default shall be made in the due observance or performance of any other covenant or condition herein required to be kept or performed by the railroad company, and any such last-mentioned default shall continue for a period of six months after written notice thereof from the trustee; then, and in each and every such case of default, with or without entry, personally or by attorney, in its discretion, (a) the trustee may sell to the highest and best bidder all and singular the stocks, bonds, and other property which then shall be held by

the trustee, or in any manner shall be subject to this indenture, including any real and personal property, franchises, and rights of
205 any kind, and all right, title and interest, claim and demand therein, and right of redemption thereof, in one lot and as an entirety, unless a sale in parcels shall be required under the provisions of section 6 of this article four, in which case such sale may be made in parcels as in said section provided, which sale or sales shall be made at public auction at such place in the city of New York, in the State of New York, or at such other place or places, and at such time or times, and upon such terms as the trustee may fix and briefly specify in the notice or notices of sale to be given, as herein provided; or, (b) the trustee may proceed to protect and enforce its rights and rights of bondholders under this indenture by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for the foreclosure of this indenture, or for the enforcement of any other appropriate legal or equitable remedy, as the trustee, being advised by counsel learned in the law, shall deem most effectual to protect and enforce any of its rights or duties hereunder.

SEC. 5. Upon the written request of the holders of twenty-five per cent in amount of the bonds hereby secured, in case of any such continuing default, it shall be the duty of the trustee, upon being indemnified as hereinafter provided, to take all steps needful for the protection and enforcement of its rights and the rights of the holders of the bonds hereby secured, and to exercise the powers of entry or sale herein conferred, or both, or to take appropriate judicial proceedings by action, suit, or otherwise, as the trustee, being advised by counsel learned in the law, shall deem most expedient in the interest of the holders of the bonds hereby secured; but, anything in this indenture to the contrary notwithstanding, the holders of seventy-five per cent in amount of the bonds hereby secured and then outstanding, from time to time, shall have the right to direct and
206 to control the method and place of conducting any proceedings for any sale of the premises subject to the lien of this indenture, or for the foreclosure hereof, or for a receiver or any other proceedings hereunder.

SEC. 6. In the event of any sale hereunder, whether under the power of sale or by virtue of judicial proceedings, or of some judgment or decree of foreclosure and sale, the whole of the property held by the trustee, or in any manner subject to this indenture, shall be sold in one parcel and as an entirety, unless the holders of a majority in amount of the bonds hereby secured, then outstanding, shall in writing request the trustee to cause said premises to be sold in parcels, in which case the sale or sales shall be made in such parcels, and at such times and places, as may be specified in such request, or unless such sale as an entirety shall be impracticable by reason of some statute or other cause. This provision shall bind the parties hereto, and the holders of the bonds and the coupons hereby secured.

SEC. 7. Notice of any sale pursuant to any provision of this indenture shall state the time and place or the times and places when and where the same is to be made, and shall contain a brief general description of the property to be sold, and shall be given sufficiently if published once in each week for four successive weeks prior to such sale in a newspaper published in New York, N. Y.

207 SEC. 8. From time to time the trustee may adjourn any sale by it to be made under the provisions of this indenture, by announcement at the time and place appointed for such sale, or for such adjourned sale or sales; and, in such event, without further notice or publication, the trustee may make such sale at the time and place to which the same shall be so adjourned.

SEC. 9. Upon the completion of any sale or sales under this indenture the trustee shall execute and deliver to the accepted purchaser or purchasers good and sufficient assignments, transfers, and conveyances of the stocks, bonds, and other property sold, and shall deliver to such purchaser or purchasers all bonds and obligations and the certificates for all shares of stock by it, held hereunder, which shall have been sold to such purchaser or purchasers. The trustee and its successors hereby are appointed the true and lawful attorney or attorneys irrevocable, of the railroad company, in its name and stead to make all necessary assignments, transfers and conveyances of shares of stock or bonds or other property thus sold; and for that purpose it and they may execute all necessary acts of assignment and transfer and may substitute one or more persons with like power; the railroad company hereby ratifying and confirming all that its said attorney or attorneys or such substitute or substitutes shall lawfully do by virtue hereof.

Any such sale or sales made under or by virtue of this indenture, whether under the power of sale hereby granted and conferred, or under and by virtue of judicial proceedings, shall operate to divest all right, title, interest, claim, and demand whatsoever, either at law or in equity, of the railroad company, of, in and to the property sold, and shall be a perpetual bar, both at law and in equity, against the railroad company, its successors and assigns, and against any and all persons claiming or to claim the premises sold, or any part thereof, from, through or under the railroad company, its successors or assigns.

208 SEC. 10. The receipt of the trustee shall be a sufficient discharge to any purchaser of the property or any part thereof, sold as aforesaid, for the purchase money; and no such purchaser or his representatives, grantees or assigns, after paying such purchase money and receiving such receipt, shall be bound to see to the application of such purchase money upon or for any trust or purpose of this indenture, or shall in any manner whatsoever be answerable for any loss, misapplication or nonapplication of any such purchase money or any part thereof, or shall be bound to inquire as to the authorization, necessity, expediency or regularity of any such sales.

SEC. 11. In case of such sale, whether made under the power of sale hereby granted or pursuant to judicial proceedings, the whole of the

principal sums of the bonds hereby secured, if not previously due, shall at once become due and payable, anything in said bonds or in this indenture to the contrary notwithstanding.

SEC. 12. The purchase money, proceeds or avails of any such sale, whether under the power of sale hereby granted or pursuant to judicial proceedings, together with any other sums which then may be held by the trustee under any of the provisions of this indenture as part of the trust estate or the proceeds thereof, shall be applied as follows:

First. To the payment of the costs and expenses of such sale, including a reasonable compensation to the trustee, its agents, attorneys and counsel, and of all expenses, liabilities and advances made or incurred by the trustee under this indenture and to the payment of all taxes, assessments or liens prior to the lien of these presents, except any taxes, assessments or other superior liens to which such sales shall have been made subject;

209 Second. To the payment of the whole amount then owing or unpaid upon the bonds hereby secured for principal and interest, with interest at the rate of four per cent per annum on the overdue installments of interest, and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the said bonds, then to the payment of such principal and interest, ratably, without preference or priority of principal over interest, or of interest over principal, or of any installment of interest over any other installment of interest, subject, however, to the provisions of section 1 of this article four: and

Third. To the payment of the surplus, if any, to the railroad company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same.

SEC. 13. Upon any such sale by the trustee or pursuant to judicial proceedings, any purchaser, in settlement or payment of the purchase price of the property purchased, shall be entitled to use and apply any bonds, and any matured and unpaid coupons hereby secured, by presenting such bonds and coupons in order that there may be credited thereon the sums applicable to the payment thereof under section 12 of this article; and such purchaser thereupon shall be credited, on account of such purchase price payable by him, with the sums so applicable to the payment of, and credited on, the bonds and coupons so presented; and, at any such sale, any bondholders may bid for and purchase such property, and may make payment therefor as aforesaid, and, in compliance with the terms of sale, may hold, retain, and dispose of such property without further accountability.

210 SEC. 14. The railroad company covenants that (1) in case default shall be made in the payment of any interest on any bonds at any time outstanding and secured by this indenture, and such default shall continue for a period of six months, or (2) in case default shall be made in the payment of the principal of any such bonds when the same shall become payable, whether at the maturity of said bonds, or by declaration as authorized by this indenture, or upon a sale of the mortgaged premises as hereinbefore provided, then,

upon demand of the trustee, the railroad company will pay to th
trustee, for the benefit of the holders of the bonds and coupons hereb
secured, then outstanding, the whole amount which then shall hav
become due and payable on all such bonds and coupons then ou
standing, for interest or principal, or both, as the case may be, wit
interest at the rate of four per cent per annum upon the overdu
principal and installments of interest; and in case the railroad com
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trustee in its own name, and as trustee of an express trust, shall b
entitled to recover judgment for the whole amount so due and unpai

The trustee shall be entitled to recover judgment as aforesai
either before or after or during the pendency of any proceedings fo
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and pledged premises, and the right of the trustee to recover suc
judgment shall not be affected by any entry or sale hereunder, or b
the exercise of any other right, power, or remedy for the enforcemen
of the provisions of this indenture or the foreclosure of the lie
thereof; and in case of a sale of the mortgaged premises, and of th
application of the proceeds of sale to the payment of the mortgag
debt, the trustee, in its own name and as trustee of an express trus
shall be entitled to enforce payment of and to receive all amoun
then remaining due and unpaid upon any and all of the bond
211 issued hereunder and then outstanding, for the benefit of th
holders thereof, and shall be entitled to recover judgment fo
any portion of the mortgage debt remaining unpaid, with interes
No recovery of any such judgment by the trustee, no levy of an
execution upon any such judgment upon property subject to the lie
of this indenture, or upon any other property, shall in any manne
or to any extent affect the lien of this indenture upon the mortgage
premises or any part thereof, or any rights, powers or remedies o
the trustee hereunder, or any lien, rights, powers, or remedies of th
holders of the bonds hereby secured, but such lien, rights, power
and remedies of the trustee and of the bondholders shall continu
unimpaired as before.

Any moneys thus collected by the trustee under this section sha
be applied by the trustee towards payment of such amounts then du
and payable upon such bonds and coupons and in respect of whic
such moneys shall have been collected, ratably and without any pre
erence or priority of any kind, upon presentation of the respectiv
bonds and coupons and stamping such payments thereon, if partl
paid, or upon cancellation thereof, if paid in full.

SEC. 15. The railroad company will not at any time insist upon o
plead, or in any manner whatever claim, or take the benefit or adva
tage of, and stay or extension law, now or at any time hereafter i
force in any locality where the mortgaged premises or pledged pro
erty, or any part of either, may or shall be situate, nor will it clai
take or insist on, any benefit or advantage from any law now or her
after in force providing for the valuation or appraisement of th
mortgaged premises or pledged property, or any part thereof, pri

to any sale, or sales, thereof to be made pursuant to any provision herein contained, or to the decree of any court of competent jurisdiction, nor after any such sale or sales will it claim or exercise any right, conferred by any statute enacted by any State, or otherwise, to redeem the property so sold or any part thereof, and
212 it hereby expressly waives all benefit and advantage of any such law or laws, and it covenants that it will not hinder, delay or impede the execution of any power herein granted and delegated to the trustee, but that it will suffer and permit the execution of every such power as though no such law or laws had been made or enacted.

SEC. 16. Upon filing a bill in equity, or upon beginning any other judicial proceedings, to enforce any right of the trustee or of the bondholders under this indenture, the trustee shall be entitled to exercise the right of entry herein conferred, and also any and all other rights and powers herein conferred, and provided to be exercised by the trustee upon the occurrence and continuance of default, as hereinbefore provided; and, as matter of right, the trustee shall be entitled to the appointment of a receiver of the premises subject to the lien of this indenture, and of the earnings, income, revenue, rents, issues or profits thereof, with such powers as the court making such appointment shall confer; but notwithstanding the appointment of any receiver, the trustee shall be entitled, as pledgee, to continue to retain possession and control of the stocks, bonds, cash and other property pledged or to be pledged with the trustee hereunder.

SEC. 17. At any time hereafter before full payment of the bonds secured hereby and whenever it shall deem expedient for the better protection or security of such bonds (although then there shall be no default entitling the trustee to exercise the rights and powers conferred by section 2 of this article four of this indenture) the railroad company, with the consent of the trustee, may authorize the trustee for any period, fixed or indefinite, to vote upon all the shares of stock then held by the trustee hereunder, and to collect the dividends thereon and the interest upon any bonds or other obligations then
213 held by the trustee hereunder, and to enter into full possession of the whole or any part of the property and premises hereby mortgaged or conveyed or intended so to be. In such event the trustee shall have, and may exercise, the same rights and powers, and shall apply the moneys by it collected or received, in the manner provided in said section 2 of this article four in case of exercise by the trustee of the rights and powers thereby conferred upon a default continuing as therein set forth; but no action under this section shall prejudice or impair the right of the trustee at any time subsequently to exercise, or to continue to exercise, the rights and powers conferred by said section 2 of this article four, or by any other provision of this indenture, when entitled thereto.

SEC. 18. No holder of any bond or coupon hereby secured shall have any right to institute any suit, action or proceeding in equity or at law for the foreclosure of this indenture, or for the execution of any

trust thereof, or for the appointment of a receiver, or for any other remedy hereunder, unless such holder previously shall have given to the trustee written notice of such default and of the continuance thereof, as hereinbefore provided; nor unless, also, the holders of twenty-five per cent in amount of the bonds hereby secured, then outstanding, shall have made written request upon the trustee, and shall have afforded to it a reasonable opportunity, either to proceed to exercise the powers hereinbefore granted, or to institute such action, suit or proceeding in its own name; nor unless, also, they shall have offered to the trustee adequate security and indemnity against the costs, expenses and liabilities to be incurred therein or thereby; and such notification, request and offer of indemnity are hereby declared, in every such case, at the option of the trustee, to be conditions precedent to the execution of the powers and trusts of this indenture and to any action or cause of action, for foreclosure or for the appointment of a receiver, or for any other remedy hereunder: it being understood and intended that no one or more holders of bonds and
214 coupons shall have any right in any manner whatever to affect, disturb or prejudice the lien of this indenture by his or their action, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings at law or in equity shall be instituted, had and maintained in the manner herein provided and for the equal benefit of all holders of such outstanding bonds and coupons.

SEC. 19. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the trustee, or to the holders of bonds hereby secured, is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative, and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute.

SEC. 20. No delay or omission of the trustee, or of any holder of bonds hereby secured, to exercise any right or power accruing upon any default, continuing as aforesaid, shall impair any such right or power, or shall be construed to be a waiver of any such default, or an acquiescence therein; and every power and remedy given by this article to the trustee, or to the bondholders, may be exercised from time to time, and as often as may be deemed expedient, by the trustee or by the bondholders.

ARTICLE FIVE.

No recourse under or upon any obligation, covenant or agreement of this indenture, or of any bond or coupon hereby secured, or because of the creation of any indebtedness hereby secured, shall be had against any incorporator, stockholder, officer, or director of the railroad company, or of any successor corporation, either directly
215 or through the railroad company, by the enforcement of any assessment or by any legal or equitable proceeding by virtue of any statute or otherwise; it being expressely understood that this mortgage, and the obligations hereby secured, are solely corporate obligations, and that no personal liability whatever shall attach to,

or be incurred by, the incorporators, stockholders, officers, or directors of the railroad company, or of any successor corporation, or any of them, because of the creation of the indebtedness hereby authorized, or under or by reason of the obligations, covenants or agreements contained in this indenture, or in any of the bonds or coupons hereby secured, or implied therefrom: and that any and all personal liability of every name and nature, either in common law or in equity, or by statute of, and any all rights and claims against every such stockholder, officer, or director are hereby expressly waived as a condition of and as a consideration for the execution of this indenture and the issue of such bonds and coupons.

ARTICLE SIX.

SECTION 1. Any request or other instrument, required by this indenture to be signed and executed by bondholders, may be in any number of concurrent instruments of similar tenor and may be signed or executed by such bondholders in person or by agent appointed in writing. Proof of the execution of any such request or other instrument, or of a writing appointing any such agent, and of the holding by any person of coupon bonds transferable by delivery, shall be sufficient for any purpose of this indenture, and shall be conclusive in favor of the trustee with regard to due action taken by it under such request or other instrument, if made in the following manner:

The fact and date of the execution by any person of any such
216 request, or other instrument, or writing, may be proved by the certificate of any notary public, or other officer authorized to take acknowledgments of deeds to be recorded in New York, that the person whose name was subscribed to such request or other instrument acknowledged to him the execution thereof, or by an affidavit of a witness to such execution.

The amount of coupon bonds transferable by delivery, held by any person executing any such request or other instrument as a bondholder, and the amounts and issue numbers of the bonds held by such persons, and the date of his holding the same, may be proved by a certificate executed by any trust company, bank, bankers or other depositary (wherever situated), if such certificate shall be deemed by the trustee to be satisfactory, showing therein that at the date therein mentioned such person had on deposit with such depositary the bonds described in such certificate. The ownership of registered coupon bonds or of registered bonds without coupons shall be proved by the registers of such bonds.

SEC. 2. The railroad company and the trustee may deem and treat the bearer of any coupon bond hereby secured, which shall not at the time be registered as hereinbefore authorized, and the bearer of any coupon for interest on any such bond, whether such bond shall be registered or not, as the absolute owner of such bond and coupon, as the case may be, for the purpose of receiving payment thereof and for

1919

all other purposes; and neither the railroad company nor the trustee shall be affected by any notice to the contrary.

The railroad company and the trustee may deem and treat the person in whose name any registered bond without coupons issued hereunder shall be registered upon the books of the railroad company, as hereinbefore provided, as the absolute owner of such bond for the purpose of receiving payment of, or on account of, the principal and interest of such bond, and for all other purposes, and may deem
217 and treat the person in whose name any coupon bond shall be so registered as the absolute owner thereof for the purpose of receiving payment of, or on account of, the principal thereof, and for all other purposes except to receive payment of interest represented by outstanding coupons; and all such payments so made to any such registered holder for the time being, or upon his order, shall be valid and effectual to satisfy and discharge the liability upon such bond to the extent of the sum or sums so paid.

ARTICLE SEVEN.

In case any real property, rolling stock, machinery or other tangible property (but not shares of stock or certificates therefor, bonds, certificates of indebtedness or other securities) shall be conveyed or mortgaged to the trustee hereunder, then from time to time, upon the written request of the railroal company approved by resolution of its board of directors or executive committee, the trustee shall release from the lien and operation of this indenture any of such real property, rolling stock, machinery or other tangible property described in such written request; provided, that there shall be delivered to the trustee together with such written request a certified copy of the resolution approving thereof, and a certificate signed by the president or a vice-president of the railroad company, stating (a) that the railroad company has sold or exchanged, or has agreed to sell or exchange, such property, and the price or consideration to be received therefor by the railroad company, in cash or other property, and that such price or consideration in his opinion is equal to the full value of such property; and (b) that it is no longer necessary or expedient to retain the property described in such request for use in carrying on the business of the railroad company or in connection with the maintenance or operation of any mine, colliery, railway or property belonging to any of the companies of whose capital
218 stock the greater part shall then be held by the trustee hereunder.

The railroad company covenants and agrees that it will set aside, separate and apart from all other property and funds of the railroad company, the price or consideration by it received for any property which may be released under the provisions of this article, and that the same shall be applied, but only with the approval of the trustee, for some one or more of the purposes for which bonds or their pro-

ceeds reserved under section 3 of article one of this indenture may be applied.

It is expressly understood and declared that nothing in this article contained shall authorize or permit the release by the trustee of any shares of stock of the certificates therefor, or any bonds or other evidences of indebtedness or securities which shall be held by the trustee hereunder, but that the provisions of this article shall apply only to real property, rolling stock, machinery, or other tangible property which, pursuant to any provision of this indenture, shall have been conveyed or assigned to the trustee by way of mortgage.

Article eight.

Section 1. The trustee shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof, if such agent or attorney shall have been selected with reasonable care; or for anything whatever in connection with this trust, except willful misconduct or gross negligence. The trustee shall not be personally liable for any debts contracted by it, or for damages to persons or property carried or injured, or for salaries or nonfulfillment of contracts during any period wherein the trustee shall manage the trust property or premises. The trustee shall not
219 be under any obligation to take any action towards the execution or enforcement of the trusts hereby created, which, in its opinion, shall be likely to involve it in expense or liability, unless one or more of the holders of the bonds hereby secured shall, as often as required by the trustee, furnish it reasonable indemnity against such expense or liability; nor shall the trustee be required to take notice of any default hereunder, unless notified in writing of such default by the holders of at least five per cent. in amount of the bonds hereby secured then outstanding, or to take any action in respect of any default unless requested to take action in respect thereof by a writing signed by the holders of not less than twenty-five per cent. in amount of the bonds hereby secured, then outstanding, and tendered reasonable indemnity as aforesaid, anything herein contained to the contrary notwithstanding; but the foregoing provisions of this section are intended only for the protection of the trustee, and shall not be construed to limit or affect any discretion or power by any provision of this indenture given to the trustee to determine whether or not it shall take action in respect of any default, or any power or discretion of the trustee to take action in respect of any default without such notice or request from bondholders. The trustee shall not be responsible for the recording of this indenture and shall not be required to file the same as a chattel mortgage.

The trustee shall be entitled to reasonable compensation for all services rendered by it in the execution of the trusts hereby created, and the railroad company agrees to pay such compensation, as well as all expenses necessarily incurred or disbursed by the trustee hereunder.

SEC. 2. The trustee, or any trustees hereafter appointed, may resign, and may be discharged of the trusts created by this denture by giving notice thereof to the railroad company and to the bondholders, by publication, at least twice a week, for four successive weeks, in one newspaper at that time published in New York, N. Y.

220 The trustee may be removed at any time by an instrument in writing under the hands of the holders of not less than two-thirds in amount of the bonds hereby secured and then outstanding.

SEC. 3. In case at any time said trustee, The Mercantile Trust Company, or any trustee hereafter appointed, shall resign or shall be removed or otherwise shall become incapable of acting, a successor or successors may be appointed by the holders of a majority in amount of the bonds hereby secured then outstanding, by an instrument or concurrent instruments signed by such bondholders or their attorneys in fact duly authorized; provided, nevertheless, and it is hereby agreed and declared that, in case at any time there shall be a vacancy in the office of trustee hereunder, the railroad company, by an instrument executed by order of its board of directors, may appoint a trustee to fill such vacancy until a new trustee shall be appointed by the bondholders as herein authorized. Thereupon the railroad company shall publish notice of such appointment once a week for six successive weeks in a newspaper published in New York, N. Y., but any new trustee so appointed by the railroad company shall immediately and without further act be superseded by a trustee appointed in the manner above provided by the holders of a majority in amount of the bonds hereby secured prior to the expiration of one year after such publication of notice. Every such trustee appointed in place of The Mercantile Trust Company, or its successor in the trust, shall always be a trust company in good standing, doing business in the city of New York, and having a capital and surplus aggregating at least $1,000,000, if there be such a trust company willing and able to accept the trust upon reasonable or customary terms.

Any such new trustee appointed hereunder shall execute, acknowledge, and deliver to the trustee last in office, and also to the

221 railroad company, an instrument accepting such appointment hereunder, and thereupon such new trustee, without any further act, deed, or conveyance shall become vested with all the estates, properties, rights, powers, trusts, duties, and obligations of its predecessor in the trust hereunder with like effect as if originally named as trustee herein; but, nevertheless, on the written request of the new trustee, the trustee ceasing to act shall execute and deliver an instrument transferring to such new trustee, upon the trusts herein expressed, all the estates, properties, rights, powers, and trusts of the trustee so resigning or removed, and shall duly assign, transfer, and deliver all stocks, bonds, or other property and moneys held by such trustee to the new trustee so appointed in its place; and, upon request

of any such new trustee, the railroad company shall make, execute, acknowledge, and deliver any and all assignments, deeds, conveyances, or instruments in writing for more fully and certainly vesting in and confirming to such new trustee all such estates, properties, rights, powers, and duties.

221 ARTICLE NINE.

SECTION 1. Until some default shall have been made in the due and punctual payment of the interest, or of the principal of the bonds hereby secured, or of some part of such interest or principal, or in the due and punctual performance and observance of some covenant or condition hereof obligatory upon the railroad company, and until such default shall have continued beyond the period of grace, if any, herein provided in respect thereof, or until the railroad company voluntarily shall waive any such period of grace (such waiver by the railroad company being hereby expressly permitted), the railroad company, its successors and assigns, shall be suffered and permitted to retain actual possession of any property, other than certificates for shares of stock, bonds, certificates of indebtedness or other
222 securities, cash, or other property pledged or to be pledged hereunder with the trustee, which hereafter may be mortgaged to the trustee pursuant to any provision of this indenture, and to manage, operate, and use such property, with the rights and franchises appertaining thereto, and to collect, receive, take, use, and enjoy the earnings, income, rents, issues, and profits thereof, but not to sell or dispose of the property itself except as expressly in this indenture authorized; and to vote upon or to cause to be voted upon all the shares of stock subject to this indenture except as hereinbefore otherwise expressly provided.

SEC. 2. If, when all the bonds hereby secured shall have become due and payable, the railroad company well and truly shall pay, or shall cause to be paid, the whole amount of the principal moneys and interest due upon all of such bonds and coupons for interest thereon then due and unpaid, or shall provide for such payment by depositing with the trustee hereunder for the payment of such bonds and coupons, the entire amount then due thereon for principal and interest, and also shall pay, or shall cause to be paid, all other sums payable hereunder by the railroad company (including any costs and charges of the trustee or of the sinking fund trustee then remaining unpaid), and well and truly shall keep and perform all the things herein required to be kept and performed by it according to the true intent and meaning of this indenture, then and in that case all property, rights, and interests hereby conveyed or pledged shall revert to the railroad company and the estate, rights, title, and interest of the trustee shall thereupon cease, determine, and become void, and in such case the trustee, on demand of the railroad company, and at its cost and

expense, shall execute proper instruments acknowledging satisfaction of and discharging this indenture; otherwise the same shall be, continue, and remain in full force and virtue.

223 ARTICLE TEN.

SECTION 1. All the covenants, stipulations, promises, and agreements in this indenture contained, by or in behalf of the railroad company, shall bind its successors and assigns, whether or not so expressed.

SEC. 2. Nothing contained in this indenture or in any bond hereby secured shall prevent any consolidation or merger of the railroad company with any other corporation or any conveyance and transfer subject to the continuing lien of this indenture and to all the provisions thereof, of all the mortgaged and pledged premises as an entirety to any other corporation; provided, however, that such consolidation, merger, or sale shall not impair the lien and security of this indenture, or any of the rights or powers of the trustee, or of the bondholders hereunder, and that all stock, and the certificates therefor, and all bonds, certificates of indebtedness, and other obligations then held by the trustee shall continue to be held by the trustee, as though such consolidation, merger, or sale had not taken place, and, provided, further, that upon such consolidation, merger, or sale the due and punctual payment of the principal and interest of all of the said bonds according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this indenture, shall be assumed by the corporation formed by such consolidation or merger, or purchasing as aforesaid.

SEC. 3. In case, pursuant to section 2 of this article, the railroad company shall be consolidated or merged with any other corporation, or shall sell, convey, and transfer, subject to this indenture, all the mortgaged and pledged premises as an entirety, as aforesaid, the successor corporation formed by such consolidation, or into which the railroad company shall have been merged, or which shall have
224 purchased and received a conveyance and transfer as aforesaid—upon executing, acknowledging, and delivering to the trustee an indenture satisfactory to the trustee, whereby such successor corporation shall assume the due and punctual payment of the principal and interest of said bonds and the performance of all the covenants and conditions of this indenture—shall succeed to, and shall be substituted for, the railroad company, party of the first part hereto, with the same effect as though it had been named herein as such party of the first part; and thereupon such successor corporation may cause to be signed, and may issue, either in its own name or in name of the railroad company, any or all of such bonds which theretofore shall not have been signed by the railroad company and delivered to the trustee; and, upon the order of said successor corporation, in lieu of the railroad company, and subject to all the terms, conditions, and restrictions herein prescribed, the trustee shall certify and shall de-

liver any of such bonds, which previously shall have been signed and delivered by the officers of the railroad company to the trustee for certification, and any of such bonds which such successor corporation thereafter shall cause to be signed and delivered to the trustee for that purpose. All the bonds so issued shall, in all respects, have the same legal rank and security as the bonds theretofore or thereafter issued in accordance with the terms of this indenture, as though all of said bonds had been issued at the date of the execution thereof.

SEC. 4. For every purpose of this indenture, including the execution, issue, and use of any and all bonds hereby secured, the words "railroad company" include and mean, not only the party of the first part hereto, but also any such successor corporation. Every such successor corporation shall possess, and from time to time may exercise, each and every right and power hereunder of the railroad company in its name or otherwise.

225 SEC. 5. Any act or proceeding, by any provision of this indenture required to be done or performed by any board or officer of the railroad company, shall and may be done and performed with like force and effect by the like board or officer of any corporation that shall at the time be such lawful sole successor of the railroad company.

SEC. 6. Nevertheless, before the exercise of the powers conferred by this article the railroad company, by instrument in writing executed by authority of two-thirds of its board of directors and delivered to the trustee, may surrender any of the powers reserved to the railroad company or to such successor corporation under this article; and thereupon such power so surrendered shall terminate.

The Mercantile Trust Company, trustee, party hereto of the second part, hereby accepts the trusts in this indenture declared and provided, and agrees to perform the same upon the terms and conditions hereinbefore set forth.

Except when otherwise indicated, the words "the trustee" or "said trustee," or any other equivalent term, as used in this indenture shall be held and construed to mean the trustee or trustees, for the time being, whether original or successor, and the words "trustee," "bond," "bondholder," "coupon," and "holder" shall include the plural as well as the singular number, and the term "majority" shall signify "majority in amount," whether or not so expressed.

The internal-revenue stamps required by law are to be affixed to this indenture from time to time when and as the bonds thereby secured shall be issued.

In witness whereof, Erie Railroad Company, the party hereto of the first part, has caused this indenture to be signed by its
226 president, and its corporate seal to be hereunto affixed, and the same to be attested by the signature of its secretary, and the due execution of these presents to be proved, and the Mercantile Trust Company, the party hereto of the second part, has caused its corporate seal to be hereunto affixed, and the same to be attested by the signa-

ture of its secretary, and the due execution of these presents to be proved, and these presents to be signed by its vice-president.

ERIE RAILROAD COMPANY,
By E. B. THOMAS, *President.*

Signed, sealed, and delivered in the presence of—
WM. H. BRUDER.

Attest:
[SEAL.] J. A. MIDDLETON, *Secretary.*

THE MERCANTILE TRUST COMPANY,
By H. C. DEMING, *Vice-President.*

Signed, sealed, and delivered in the presence of—
WM. H. BRUDER.

Attest:
[SEAL.] E. R. ADEE, *Secretary.*

On page 35, line 13, the words " President of the " interlined before execution.

WM. H. BRUDER.

227 STATE OF NEW YORK,
County of New York, ss:

On the 14th day of March, in the year one thousand nine hundred and one, before me personally came Eben B. Thomas, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he is the president of Erie Railroad Company, the corporation described in and which executed the above instrument as party of the first part therein; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

WM. H. BRUDER, [SEAL.]
Notary Public, New York Co.

STATE OF NEW YORK,
County of New York, ss:

On the 14th day of March, in the year one thousand nine hundred and one, before me personally came Henry C. Deming, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice-president of the Mercantile Trust Company, the corporation described in and which executed the above instrument as party of the second part therein; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

I. MICHAELS, [SEAL.]
Notary Public,
New York County, N. Y., No. 65.

231 *General mortgage, securing four per cent convertible fifty-year gold bonds.—Interest payable April 1 and October 1.*

Erie Railroad Company to the Standard Trust Company of New York, trustee. Dated April 1, 1903. Stetson, Jennings & Russell, General Counsel, 15 Broad street, New York.

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237 This indenture, made this first day of April, in the year one thousand nine hundred and three, between

Erie Railroad Company, a corporation created by and existing under the laws of the State of New York, hereinafter called the "railroad company," party of the first part, and

The Standard Trust Company of New York, a corporation created by and existing under the laws of the State of New York, hereinafter called the "trustee," party of the second part.

Whereas at the 43rd meeting of the board of directors of the railroad company, duly held, pursuant to due notice, at the office of the company, in the city of New York, on the 11th day of February, 1903, a quorum being present, resolutions were duly adopted, including the following, that is to say:

Whereas upon the report of the president this day made, the board of directors of the Erie Railroad Company has determined that it is desirable now to make comprehensive provision for the progressive improvement of the line and terminals of its railroad, during a series of years, to an extent involving the probable expenditure of $50,000,000 for such purpose, and for the acquisition of equipment and the funding or consolidation of existing obligations, which sum can best be provided through an issue of four per cent convertible fifty-year bonds, such bonds to be dated April 1, 1903, and to be convertible into the common stock of the company (stock trust certificates), at a price not less than the market value thereof at the date when the stockholders of the company shall have given their consent to such bonds; such bonds to be issued either in a single series or in successive series, and such price of conversion to be fixed from time to time by the board of directors when authorizing the issue of the several series, and to be specified in every bond of the several series when and as issued;

Now therefore be it

Resolved, That for the purpose of completing and finishing or operating and improving its railroad, or for any other of its lawful purposes, including the acquisition of equipment or the funding or consolidation of existing obligations, the Erie Railroad Com-
238 pany do borrow the sum of $50,000,000, and do issue and dispose of its bonds for such amount so borrowed, and do mortgage its property and franchises to secure the payment of the said bonds; and, accordingly, that the president or any vice-president, and the secretary or any assistant secretary, of the Erie Railroad Company, be, and hereby they are, authorized to execute and to issue and deliver bonds of the Erie Railroad Company for the aggregate principal sum of $50,000,000 dated April 1, 1903, and payable April 1, 1953, with interest thereon at the rate of four per cent per annum, payable semi-annually on the first day of April and the first day of October in each and every year until the principal shall be fully paid; both the principal and the interest to be payable in gold coin of the United States of the present standard of weight and fineness, at the office or agency of the Erie Railroad Company in the city of

New York, without deduction for any tax or taxes which the railroad company or the trustee may be required to pay or to retain therefrom, under or by reason of any present or future law of the United States or of any State, county, or municipality therein; such bonds to be coupon bonds each for the principal sum of $1,000, giving to the holder the right to register the principal thereof and the right to convert the same into registered bonds without coupons; and also registered bonds without coupons, each for the principal sum of $500, of $1,000, or of such multiples of $1,000 as from time to time may be prescribed by the railroad company by resolution of its board of directors: the bonds to be substantially in the form now submitted to this meeting, of which copies are annexed to the minutes thereof; interim or temporary bonds to be issued and to be exchangeable for permanent bonds pursuant to like resolution.

Resolved, That at any time after April 1, 1905, and before April 1, 1915, the holder of any such bonds shall have the right to convert the principal thereof at par into common stock (stock trust certificates) of the Erie Railroad Company at a price not less than the market value thereof at the date when the stockholders of this company shall have given their consent to such bonds; such bonds to be issued either in a single series, or in successive series, and such prices of conversion to be fixed from time to time by the board of directors when authorizing the issue of the several series, and to be specified in every bond of the several series when and as issued.

Resolved, That the president or any vice-president, and the secretary or any assistant secretary, of the Erie Railroad Company, be, and hereby they are, authorized in the name and behalf of the Erie Railroad Company, and under its corporate seal, to execute and acknowledge, and to deliver to the Standard Trust Company of New York, a corporation of the State of New York, as trustee, a
239 mortgage or deed of trust to be dated April 1, 1903, mortgaging and pledging any and all of the railroads, franchises, income and property, now owned or hereafter acquired by the Erie Railroad Company, as security for the said issue of bonds for the aggregate principal sum not exceeding $50,000,000, authorized by the foregoing resolutions; such mortgage or deed of trust to be in form generally similar to the first consolidated mortgage or deed of trust of the Erie Railroad Company dated December 10, 1895, and to be prepared and approved by the general counsel of this company.

Resolved, That the coupons attached to the said coupon bonds to be issued under these resolutions may be authenticated by the engraved fac-simile signature of the present treasurer, or of any future treasurer of the Erie Railroad Company, it being hereby intended that the railroad company may adopt, and may use for that purpose, the engraved signature of any person who shall have been such treasurer, notwithstanding the fact that he may have ceased to be such treasurer, at the time when such bonds shall actually be certified and delivered.

Resolved, That the first $10,000,000 bonds of such $50,000,000 bonds shall be convertible at par into common stock at $50 per share, and

from time to time, when and as it shall become necessary for the conversion of any of said $50,000,000 bonds, the common stock be increased to the required amount, and that whenever so requested by the voting trustees such increased stock be issued to them in exchange for such bonds, that they may issue their common stock trust certificates in respect thereof.

Resolved, That the president or any vice-president and the secretary or any assistant secretary be, and hereby they are, authorized, in behalf of the Erie Railroad Company, to take all such action as from time to time may become necessary or proper to carry these resolutions into effect.

Resolved, That the execution and delivery of the bonds hereby authorized, and of the mortgage or deed of trust securing the same, shall take place when and not before consent thereto shall have been given by stockholders owning at least two-thirds of the stock of the Erie Railroad Company, which consent shall be given and certified, and shall be filed and recorded in the office of the clerk or register of the county of New York, as provided in section 2 of the stock corporation law, and consent to such mortgage shall have been given also by the board of railroad commissioners.

And whereas prior to the execution and delivery of the bonds and of the mortgage or deed of trust securing the same, as authorized by the said resolutions, consent in due form to the execution and
240 issue of such convertible bonds conferring upon the holder thereof the right to convert the principal thereof into common stock (stock trust certificates) of the Erie Railroad Company as therein provided was duly given upon February 11, 1903, by stockholders owning at least two-thirds of the stock of the Erie Railroad Company, which consent, prior to the execution and delivery of this indenture and of the bonds therein mentioned, as thus duly given and certified, was duly filed and recorded in the office of the clerk or register of the county of New York as provided in section 2 of the stock corporation law, and consent to the execution of such mortgage has been duly given or authorized by stockholders, and has been duly given also by the board of railroad commissioners of the State of New York; and

Whereas at the 44th meeting of the board of directors of the Erie Railroad Company held upon the 21st day of April, 1903, the draft of a mortgage or deed of trust of the form and tenor and date of this indenture was submitted and read, and resolutions authorizing the execution and delivery thereof were duly and unanimously adopted by said board; and

Whereas the bonds to be secured by this indenture may be issued in series, and are to be coupon bonds of the denomination of $1,000, numbered consecutively from 1 upwards, giving to the holder the right to register the principal thereof and the right to convert the same into registered bonds without coupons; and also registered bonds without coupons, each for the principal sum of $500, or of $1,000, or of such multiples of $1,000 as from time to time may be

prescribed by the railroad company by resolution of its board of directors; every series of such bonds to have a distinctive serial letter and every such bond to bear a distinctive number or designation; and all such bonds from time to time, as directed by the board of directors of the railroad company, to be executed in the name and behalf of the corporation and under its corporate seal, by
241 the president or any vice-president, and by the secretary or any assistant secretary of the railroad company, and to be substantially of the following tenor—the letter of the series, the number of the bond, the rate at which shares of common stock will be issued in conversion of the bond, and the principal sum of each registered bond without coupons, and the date from which interest thereon is to accrue, having been inserted in the respective blanks therefor:

(Form of coupon four per cent gold bond.)

No. Series. $1,000.

UNITED STATES OF AMERICA.

Erie Railroad Company 4% convertible 50-year coupon gold bond.

Know all men by these presents, that the Erie Railroad Company, a corporation, hereinafter called the "railroad company," for value received, promises to pay to the bearer, or, if registered, to the registered holder of this bond, one thousand dollars in gold coin of the United States of America, on the first day of April, 1953, at the office or agency of the railroad company in the city of New York, N. Y., and to pay interest thereon at the rate of four per cent per annum from April 1, 1903, payable semiannually at the said office or agency, in like gold coin, on the first day of April and the first day of October in each and every year until the payment of said principal sum, but only upon presentation and surrender, as severally they shall mature, of the coupons therefor annexed hereto; such United States gold coin in every case to be of the standard of weight and fineness as it existed April 1, 1903.

Both the principal and the interest of this bond are payable without deduction for any tax or taxes which the railroad company or the trustee may be required to pay or to retain therefrom, under any present or future law of the United States, or of any State or county or municipality therein.

This bond is one of a series of four per cent convertible 50-year gold bonds (coupon and registered) of the railroad company, issued and to be issued, for an aggregate principal sum not exceeding fifty million dollars at any one time outstanding, under and in pursuance of, and all equally secured by, a mortgage or deed of trust dated
242 April 1, 1903, duly executed by the railroad company to the Standard Trust Company of New York, as trustee, of the property and franchises mentioned in said mortgage or deed of

trust, to which reference hereby is made for a description of the property and franchises mortgaged and pledged, the nature and extent of the security, the rights of the holders of said bonds under the same, and the terms and conditions upon which said bonds are secured and are to be used; the officers, directors, and stockholders of the railroad company being expressly exempted, relieved, and absolved from any and all personal liability in respect of said bonds, all such liability being hereby expressly waived.

This bond shall pass by delivery, unless registered in the owner's name on the books of the railroad company, at its office or agency in the city of New York, such registry being noted on the bond by the bond registrar of the railroad company. After such registration, no transfer shall be valid unless made on the railroad company's books by the registered owner, and similarly noted on the bond; but the same may be discharged from registry by being transferred to bearer, and thereafter transferability by delivery shall be restored, but this bond may again from time to time be registered or transferred to bearer as before. Such registration, however, shall not affect the negotiability of the coupons which shall continue to be transferable by delivery merely.

The holder, also, at his option, may surrender for cancellation this bond with the coupons for future interest thereon in exchange for a registered bond without coupons, as provided in said indenture.

As duly authorized by the consent of stockholders, the board of directors has conferred upon the holder of this bond the right to convert the principal thereof at par at any time after April 1, 1905, and before April 1, 1915, into the fully paid common stock of the Erie Railroad Company of the par value of $100, at the price of $ for each and every share; and if such common stock shall not be sufficient to meet the conversion when made, the board of directors will authorize an increase sufficient for that purpose. Accordingly this bond is convertible at the option of the holder hereof, at any time after April 1, 1905, and prior to April 1, 1915, as provided in said mortgage or deed of trust, into shares of the common capital stock of the railroad company as such stock shall be constituted at the time of such conversion, with an adjustment of current or accrued interest and dividends as between this bond and the stock into which the same may be converted, with the right on the part of the railroad company during the continuance of the voting trust agreement of January 1, 1896, in said indenture described, to deliver in lieu of certificates of common stock, voting trust certificates therefor.

243 This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon endorsed, of the trustee under this indenture.

In witness whereof, the Erie Railroad Company has caused these presents to be signed by its president or one of its vice-presidents, and its corporate seal to be hereunto affixed, and to be attested by its secretary or an assistant secretary, and coupons for such interest, with

the engraved fac-simile signature of its treasurer, to be attached hereto, this first day of April, 1903.

[L. S.] ERIE RAILROAD COMPANY,
By , *President.*

Attest:
, *Secretary.*

(Form of registered four per cent gold bond.)

No. Series. $——.

UNITED STATES OF AMERICA.

Erie Railroad Company 4% convertible 50-year registered gold bond.

Know all men by these presents, that the Erie Railroad Company, a corporation, hereinafter called the "railroad company," for value received, promise to pay to or assigns, dollars, in the gold coin of the United States of America, on the first day of April, 1953, at the office or agency of the railroad company in the city of New York, N. Y., and to pay interest thereon from the first day of , 19 , at the rate of four per cent per annum, payable semi-annually at said office or agency, in like gold coin, on the first day of April and the first day of October in each and every year until the payment of said principal sum; such United States gold coin in every case to be of the standard of weight and fineness as it existed April 1, 1903.

Both the principal and the interest of this bond are payable without deduction for any tax or taxes which the railroad company or the trustee may be required to pay or to retain therefrom, under any present or future law of the United States, or of any State or county or municipality therein.

244 This bond is one of a series of four per cent convertible 50-year gold bonds (coupon and registered) of the railroad company, issued and to be issued, for an aggregate principal sum not exceeding fifty million dollars at any time outstanding, under and in pursuance of, and all equally secured by, a mortgage or deed of trust dated April 1, 1903, duly executed by the railroad company to The Standard Trust Company of New York, as trustee, of the property and franchises mentioned in said mortgage or deed of trust, to which reference hereby is made for a description of the property and franchises mortgaged and pledged, the nature and extent of the security, the rights of the holders of said bonds under the same, and the terms and conditions upon which said bonds are secured and are to be used; the officers and directors and stockholders of the railroad company being expressly exempted, relieved, and absolved from any and all personal liability in respect of said bonds, all such liability being hereby expressly waived.

This bond is transferable by the registered holder hereof, in person or by attorney duly authorized, on the books of the railroad company, at its office or agency in the city of New York, upon surrender and cancellation of this bond; and thereupon a new registered bond will be issued to the transferee in exchange therefor, as provided in said indenture, and on payment, if the railroad company shall so require, of the charge therein provided for. This bond, also, in the manner prescribed in said indenture, and upon payment of the charge therein provided for, is exchangeable for coupon bonds for the same aggregate principal sum.

As duly authorized by the consent of stockholders, the board of directors has conferred, upon the holder of this bond, the right to convert the principal thereof at par at any time after April 1, 1905, and before April 1, 1915, into the fully paid common stock of the Erie Railroad Company of the par value of $100, at the price of $ for each and every share; and if such common stock shall not be sufficient to meet the conversion when made, the board of directors will authorize an increase sufficient for that purpose. Accordingly this bond is convertible, at the option of the holder hereof, at any time after April 1, 1905, and prior to April 1, 1915, as provided in said mortgage or deed of trust, into shares of the common capital stock of the railroad company as such stock shall be constituted at the time of such conversion, with an adjustment of current or accrued interest and dividends as between this bond and the stock into which the same may be converted, with the right on the part of the railroad company, during the continuance of the voting trust agreement of January 1, 1896, in said indenture described, to deliver in lieu of certificates of common stock, voting trust certificates therefor.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon endorsed, of the trustee under said indenture.

In witness whereof, the Erie Railroad Company has caused these presents to be signed by its president or one of its vice-presidents, and its corporate seal to be hereunto affixed, and to be attested by its secretary or an assistant secretary, this first day of April, 1903.

[L. S.] ERIE RAILROAD COMPANY,

By . *President.*

Attest:

. *Secretary.*

And whereas, there are to be attached to the said coupon bonds, at the time of the issue thereof, coupons representing the semi-annual installments of interest which are to become due thereon, each of which coupons is to be substantially of the following tenor, to wit.:

(Form of interest coupon, of which the first is to be payable October 1, 1903.)

$20.00

On the first day of Erie Railroad Company will pay to bearer, at its office or agency in the city of New York, N. Y., twenty

dollars, United States gold coin of the standard existing April 1, 1903, without deduction for taxes, being six months' interest then due on its four per cent convertible 50-year gold bond, series , No. , subject to the terms and conditions stated in said bond and in the indenture dated April 1, 1903, therein mentioned.

Treasurer.

And whereas, on each of said coupon bonds, and on each of said registered bonds without coupons, there is to be endorsed a
246 certificate of the trustee, or its successor appointed hereunder, that it is one of a series of bonds described in this indenture, and no bond shall be secured by this indenture or shall be obligatory for any purpose unless such certificate shall have been executed by the said trustee or its successor appointed hereunder; said certificate to be substantially of the following tenor, to wit:

(Form of trustee's certificate.)

This bond is one of a series of bonds described in the within mentioned indenture.

THE STANDARD TRUST COMPANY OF NEW YORK,
By . *Trustee.*

And whereas, each of the coupons to be attached to said coupon bonds is to be authenticated by the engraved fac-simile signature of the present treasurer or of any future treasurer of the railroad company, and the railroad company may adopt and may use for that purpose the engraved fac-simile signature of any person who shall have been such treasurer, notwithstanding the fact that he may have ceased to be such treasurer at the time when any such coupon bond shall be actually certified and delivered, and such coupons shall be attached to the bond; and

Whereas, this indenture is of the tenor of the draft thereof submitted to and duly approved by the railroad company; and

Whereas, all acts and things prescribed by law and by the by-laws of the railroad company have been duly complied with, and the railroad company has executed this indenture, and proposes to issue the bonds hereby secured, in the exercise of each and every legal right and power in it vested:

247 Now, therefore, this indenture witnesseth:

That in consideration of the premises and of the purchase and acceptance of such bonds by the holders thereof, and to the sum of one dollar to it duly paid by the trustee at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of all such bonds at any time issued and outstanding under this indenture, according to their tenor and effect, and the performance of all the covenants and conditions herein contained, and to declare the

rms and conditions upon which such bonds shall be issued and ceived:

The railroad company, party of the first part hereto, has executed d delivered these presents, and has granted, bargained, sold, ened, remised, released, conveyed, confirmed, assigned, transferred, l set over, and by these presents does grant, bargain, sell, alien, re-se, release, convey, confirm, assign, transfer, and set over, unto

The trustee, party of the second part, its successors and assigns rever:

All the etate right, title, interest, and property now belonging to railroad company, or that hereafter may be acquired by the rail-d company, of, in and to

All and singular the railway of the railroad company, from and luding Piermont, on the Hudson River, in the State of New York, and including the terminus of the said railway on Lake Erie at or r Dunkirk, in said State, and the railway known as the Newburgh nch, from Newburgh to the main line, and also all that part of railway designated as the Buffalo branch of the Erie Railway ending from Hornellsville to Attica, in the State of New York; o that part of the railway known as the Newburgh and New York Railroad, extending from Turners on the main line to Vail's Gate on the Newburgh branch; also the railway formerly belonging to the Lockport and Buffalo Railroad Company and ending from Lockport to North Tonawanda (subject to the lease reof to the International Railway Company), both in the State New York; also the railway formerly belonging to the Erie Inter-ional Railway Company, and extending from a point of connec-n with the road formerly known as the Suspension Bridge and e Junction Railroad in Erie County to International Bridge in e County, both in the State of New York; also the railway for-rly known as the Suspension Bridge and Erie Junction Railroad, ending from East Buffalo, in Erie County, to Suspension Bridge, Niagara County, with the passenger branch extending from the n line near Eleventh street, in the city of Niagara Falls, Niagara nty, to the passenger station at the corner of Fourth and Niagara ets, in said city, all in the State of New York; also the railway merly known as the Buffalo, New York and Erie Railroad, ex-ding from Painted Post, Steuben County, to the city of Buffalo, e County, both in the State of New York; also all the railroad merly of the Buffalo and Southwestern Railroad Company, ex-ding from Jamestown, in Chautauqua County, to Buffalo, in e County, both in the State of New York; and also all other rail-s now belonging to the railroad company in the States of New rk, Pennsylvania, and New Jersey, or any of them;

lso all the estate, right, title, and interest, terms and remainder of ns, franchises, privileges, and rights of action of whatsoever name nature in law or in equity, conveyed or assigned to the New York Erie Railroad Company, or to the Erie Railway Company, or to New York, Lake Erie and Western Railroad Company, or to the

Erie Railroad Company, by the Union Railroad Company, a corporation existing under the laws of the State of New York; by the Bergen County Railroad Company, a corporation existing under the laws of the State of New Jersey; by the Buffalo, Bradford and Pitts-
249 burg Railroad, a corporation existing under the laws of the States of New York and Pennsylvania; by the Rochester and Genesee Valley Railroad Company, a corporation existing under the laws of the State of New York; by the Long Dock Company, a corporation existing under the laws of the State of New Jersey; by the Goshen and Deckertown Railroad Company, a corporation existing under the laws of the State of New York; by the Hoboken Land and Improvement Company, a corporation existing under the laws of the State of New Jersey, by the New York and Fort Lee Railroad Company, a corporation existing under the laws of the State of New Jersey, and the New Jersey Junction Railroad Company, a corporation existing under the laws of the State of New Jersey; by the Jefferson Railroad Company, a corporation existing under the laws of the State of Pennsylvania; by the Montgomery and Erie Railroad Company, a corporation existing under the laws of the State of New York; by the New York, Lake Erie and Western Docks and Improvement Company, a corporation existing under the laws of the State of New Jersey; by the Middletown and Crawford Railroad Company, a corporation existing under the laws of the State of New York; by the New York, Lake Erie and Western Coal and Railroad Company, a corporation existing under the laws of the State of Pennsylvania; by the Northern Railroad Company of New Jersey, a corporation existing under the laws of the State of New Jersey; by the New York and Greenwood Lake Railroad Company, a corporation existing under the laws of the State of New Jersey; by the Avon, Geneseo and Mount Morris Railroad Company, a corporation existing under the laws of the State of New York; by the Tioga Railroad Company, a corporation existing under the laws of the State of Pennsylvania; or by the Newark and Hudson Railroad Company, a corporation existing under the laws of the State of New Jersey.

And also all the estate, right, title, and interest of the rail-
250 road company in and to certain real estate situate in Hudson County, in the State of New Jersey, known as the Penhorn property; and also in and to a certain parcel of land lying west of the Bergen Tunnel, in Hudson County, State of New Jersey, known as the Laundry property; and also in and to all other real estate of the railroad company, situate in the State of New Jersey, of every kind and description, and wherever in the said State the same may be situate.

And also all the estate, right, title, and interest of the railroad company of, in, and to certain piers, bulkheads, and water fronts in the said city of New York—that is to say, piers 20 and 21, North River, with slips and appurtenances; also 560 feet of bulkhead extending northerly from the northerly line of pier 19, with certain wharf sur-

face, together with ferry near foot of Chambers street, and rights and franchises appurtenant thereto; also bulkhead, slip, and ferry at the foot of West Twenty-third street, and that portion of the bulkhead between Twenty-second and Twenty-third streets abutting on the ferry, together with ferry rights and franchises appurtenant thereto; also pier at foot of West Forty-ninth street, and slips in connection therewith, together with certain water front south of the pier, and also pier 7, East River, and slips connected therewith and appurtenant thereto.

And also all tracts of land or interest therein of the railroad company lying and being in the following States and counties, namely, counties of Rockland, Orange, Sullivan, Delaware, Broome, Tioga, Chemung, Steuben, Alleghany, Livingston, Wyoming, Genesee, Erie, Niagara, Cattaraugus, Chautauqua, and Monroe, in the State of New York; counties of Hudson, Essex, Bergen, and Passaic, in the State of New Jersey; counties of Susquehanna, Jefferson, Elk, Pike, McKean, Wayne, and Lackawanna, in the State of Pennsylvania.

Also all and singular the railroad, property, and franchises of The Nypano Railroad Company demised and leased to the Erie
251 Railroad Company by the indenture made the 17th day of March, 1896, by and between said The Nypano Railroad Company, a corporation of the States of Ohio and Pennsylvania, as party of the first part thereto, and the Erie Railroad Company as party of the second part thereto, and all rights of the Erie Railroad Company of every name and nature in and to such railroad, property, and franchises leased as aforesaid; subject, however, to the conditions, reservations, and provisos set forth in a certain indenture of pledge, dated July 6, 1896, by the Erie Railroad Company to The Farmers' Loan and Trust Company, as trustee, wherein the said leasehold estate and interest was assigned to the said trustee as security under the first consolidated mortgage deed, dated December 10, 1895, made by the Erie Railroad Company to said The Farmers' Loan and Trust Company; and also any and all other right, title, and interest of every name and nature now possessed or hereafter acquired by the railroad company in or to the property, railroad, and franchises of said The Nypano Railroad Company, or of any branch, extension, or leased or operated line thereof, or in or to any stocks, bonds, or other obligations of said The Nypano Railroad Company, or of any successor company or companies, subject to the terms upon which any such acquisition may have been made.

Also all the right, title, estate, interest, and property of the railroad company of, in, and to any and all other lines of railway, extensions, and branches now owned, leased, or held by the railroad company or in which it has any interest whatsoever (excepting its leasehold interest in the Buffalo Creek Railroad, and excepting also all shares of capital stock not herein expressly described and made subject hereto), wherever located, including the franchises appurtenant thereto, notwithstanding the same may not be particularly set forth or described in this indenture.

Also all the estate, right, title, interest, and property of the railroad company of, in, and to any and all lines of railway, extensions, and branches, including the franchises appurtenant thereto, and
252 any and all ferry houses, ferry boats, shops, depots, terminal properties, rolling stock, and other equipment, and other acquisitions, additions, improvements, and betterments, and any and all bonds, stocks, and other property of every kind or description (notwithstanding that the same are not now particularly set forth in this indenture), which from time to time, in the manner hereinafter provided, shall be purchased, acquired, or constructed by the use of any of the bonds secured by this indenture.

Including in the railroads, franchises, and properties subject to this indenture any and all roadbed, superstructure, rights of way, rails, tracks, sidetracks, bridges, viaducts, buildings, depots, stations, warehouses, car houses, engine houses, freight houses, machine shops and other shops, turntables, water stations, fences, docks, structures, erections, and fixtures, and all other things of whatever kind in anywise or at any time belonging or appertaining to any and every line of railway at any time subject to this indenture, or to any branch thereof, or provided for use thereon or in connection therewith; and any and all lands designed for depots, warehouses, or other structures at any terminus or on or along such lines of railway or upon or along any such branch; and any and all locomotives, engines, cars, and other rolling stock, equipment, machinery, instruments, tools, implements, materials, furniture, and other chattels now or hereafter acquired or provided for use upon such lines of railway or branches or upon any other line or branch; and any and all property, real or personal, of every kind and description, now or hereafter acquired for use upon, or in connection with, or for the purpose of, such lines of railway or any such branch; and any and all corporate rights, privileges, and franchises which the railroad company now has, or hereafter can or shall acquire, possess, or exercise in, to, upon, or in any respect of such lines of railway or branches or any part thereof, necessary for, or appertaining to, the construction, maintenance, or
253 operation of such lines of railway or any such branch, or any part thereof; and any and all the rents, issues, profits, tolls, and other income of such lines of railway and of any and all branches; and also any and all the rights, privileges, franchises, properties, real or personal, rights, and things which the railroad company may or shall hereafter possess, or become entitled to possess, for the purposes of or in connection with such lines of railway or any such branch.

Together with all and singular the franchises, rights, and privileges now or hereafter appurtenant to or used in connection with the lines of railway above mentioned, or any branch thereof.

Also all the right, title, and interest of the railroad company in and to the following shares of stock heretofore transferred to, and now

held by, The Farmers' Loan and Trust Company, as trustee under the said first consolidated mortgage deed, dated December 10, 1895:

54	Name of company.	Par value per share.	Number of shares.
	Buffalo, New York and Erie Railroad Company	$100	8,988
	Jefferson Railroad Company	50	41,909
	Buffalo, Bradford and Pittsburgh Railroad Company	100	22,049
	Bergen County Railroad Company	100	2,000
	Middletown and Crawford Railroad Company	50	2,413
	Newark and Hudson Railroad Company	100	2,500
	Paterson, Newark and New York Railroad Company	50	5,000
	Bergen and Dundee Railroad Company	100	400
	Long Dock Company	100	8,000
	New York, Lake Erie and Western Docks and Improvement Company	100	6,040
	Suspension Bridge and Erie Junction Railroad Company	100	5,000
	Buffalo Creek Railroad Company	100	1,250
	Chicago and Erie Railroad Company	100	1,000
	Pavonia Ferry Company	100	1,000
	Hillside Coal and Iron Company	100	10,000
	Northwestern Mining and Exchange Company	100	5,000
	Glossburg Coal Company	100	10,000
	Tioga Railroad Company, preferred stock	50	3,794
	Tioga Railroad Company, common stock	50	7,818
	Elmira State Line Railroad Company	100	692
	Arnot and Pine Creek Railroad Company	100	2,550
	Union Steamboat Company	100	10,000
	Union Dry Dock Company	500	300
	Conesus Lake Railroad Company	50	375
	The Nypano Railroad Company	100	199,991

Also all the right, title, and interest of the railroad company in and to the following bonds, heretofore delivered to and now held by the said trustee under the said first consolidated mortgage deed dated December 10, 1895:

$580,000 bonds of the Buffalo, Bradford and Pittsburgh Railroad Company, secured by its mortgage dated January 1st, 1865, to Dorman B. Eaton, as trustee.

55 $57,200 bonds of the Middletown and Crawford Railroad Company, secured by its mortgage dated April 1st, 1871, to Jonathan M. Matthews, Ambrose S. Murray and Alexander Crawford, as trustees.

$250,000 bonds of the Newark and Hudson Railroad Company, secured by its mortgage dated September 20th, 1871, to H. N. Otis, as trustee.

$499,000 bonds of the Paterson, Newark and New York Railroad Company, secured by its mortgage dated January 1st, 1868, to W. C. Cushmore and C. Walsh, as trustees.

$604,000 bonds of the New York, Lake Erie and Western Docks and Improvement Company, secured by its mortgage dated June 1st, 1883, to The Farmers' Loan and Trust Company, as trustee, as modified by the supplemental contract dated February 8, 1890.

$1,900,000 bonds of the New York, Lake Erie and Western Coal and Railroad Company, secured by its mortgage dated May 15th, 1882, to the Metropolitan Trust Company of the city of New York and J. Lowber Welsh, of the city of Philadelphia, as trustees.

$1,000,000 bonds of the Suspension Bridge and Erie Junction Railroad Company, secured by its mortgage dated June 1st, 1870, to Horatio N. Otis, as trustee.

$9,899,000 income bonds of the Chicago and Erie Railroad Company, secured by its mortgage dated August 21st, 1890, to New York Security and Trust Company and John B. Elam, as trustees.

$125,000 bonds of the Tioga Railroad Company, secured by its mortgage dated November 1, 1876, to Myron P. Bush, as trustee.

$140,000 bonds of the Lockport and Buffalo Railroad Company, secured by its mortgage dated October 1, 1877, to Mathias H. Arnot, as trustee.

$20,000,000 bond of The Nypano Railroad Company, secured by its mortgage dated March 17, 1896, to The Farmers' Loan and Trust Company, as trustee.

Also all the right, title and interest of the railroad company in and to shares of stock of the following corporations, for which the certificates have been delivered to and are now held by the Mercantile Trust Company, as trustee under the Pennsylvania collateral indenture of the railroad company dated February 1, 1901, viz: The Pennsylvania Coal Company, the Erie and Wyoming Valley Railroad Company, the Delaware Valley and Kingston Railroad
256 Company, and fifty-one per cent of the capital stock of the New York, Susquehanna and Western Railroad Company.

Also *also* the right, title and interest of the railroad company in and to sixty shares, of the aggregate par value of $6,000, of the capital stock of the Penhorn Creek Railroad Company, being all the outstanding capital stock of said corporation.

But nothing in this indenture is intended or shall be construed to prevent or limit the powers in respect of any bonds and stocks, subject to this indenture conferred upon the trustee under said first consolidated mortgage deed dated December 10, 1895, or upon the trustee under the said indenture dated February 1, 1901.

Also all property of every name and nature, from time to time hereafter, by delivery or by writing of any kind, for the purposes hereof, pledged, assigned or transferred by the railroad company or anyone in its behalf to the trustee, which hereby is authorized to receive any property at any and all times, as and for additional security, and also, when and as hereinafter provided, as substituted security, for the payment of the bonds issued or to be issued hereunder, and to hold and apply any and all such property according to the terms hereof.

It being intended to include within the grant of this indenture all **the right, title and interest of the railroad company of, in and to all** lines of railway, extensions, branches, real estate and railroad property, and all stocks and bonds and other securities now or hereafter described or embraced, in the two several indentures heretofore executed and delivered by the railroad company, viz: (1) The first consolidated mortgage deed to The Farmers' Loan and Trust Company, as trustee, dated December 10, 1895, and (2) the Pennsylvania collateral indenture to The Mercantile Trust Company, as trustee, dated February 1, 1901: and of, in and to the properties severa-
257 ally and respectively mentioned in and subject to the lien of

said several indentures; and also all the right, title and interest of the railroad company of, in and to any and all other property herein conveyed, or agreed to be conveyed, to the trustee hereunder.

To have and to hold, the premises, railroads, properties, real or personal, rights, franchises, estates, appurtenances, stocks, and bonds hereby conveyed and assigned, or intended to be conveyed or assigned, unto the trustee, its successor or successors and assigns, forever:

Subject, however, to the two indentures last above mentioned, and to the existing liens of the several mortgages or charges underlying either of the said indentures, and to all other existing liens and charges, upon and against the railroads, properties, and franchises, and stocks, bonds, and other obligations, hereby or in and by said indentures, mortgages, or charges, severally and respectively, conveyed, assigned, mortgaged, or pledged, or so intended to be:

But in trust, nevertheless, for the equal, proper, and proportionate benefit and security, severally and respectively, of all and every the present and future holders of any and every bond and interest obligation issued under and secured by this indenture, as well all those now issued as all hereafter issued in addition thereto or by way of substitution or exchange, in accordance with the terms of this indenture, and for enforcing the payment thereof when payable, in accordance with the true intent and meaning of the stipulations of this indenture and of the said bonds and interest obligations respectively, without preference, priority, or distinction as to lien or otherwise, of any one bond over any other bond, by reason of priority in the execution, delivery, or negotiation thereof, and so that each and every bond, issued and to be issued as aforesaid, shall
258 have, under and by this indenture, the same right, lien, and privilege as every other bond of the issue; and so that the principal and interest of every such bond shall, subject to the terms hereof, be secured hereby equally and proportionately with every other bond, as though all had been made, executed, delivered, and negotiated simultaneously with the execution and delivery of this indenture; it being intended that the lien and security of all such bonds shall take effect from the day of the date of this indenture, without regard to the date of actual issue, sale, or disposition thereof, and so that the lien and security of this indenture, and of all bonds issued hereunder, shall take effect from the day of the date hereof, as though upon such day all such bonds shall have been actually issued, sold, and delivered to, and in the hands of, innocent holders for value.

And it is hereby expressly covenanted that all such bonds, and the coupons for interest thereon, are to be issued, certified, delivered, received, and negotiated, and that the mortgaged and pledged properties and franchises are to be held by the trustee, subject to the following further covenants, conditions, and provisions, viz:

Article one.

Section 1. From time to time the bonds to be secured hereby shall be executed by the railroad company and by it shall be delivered for

certification to the trustee; and thereupon as provided in this article, and not otherwise, the trustee shall certify and shall deliver the same. At the option of the railroad company, from time to time, any of such bonds may be executed, certified, and delivered originally either as coupon bonds or as registered bonds.

The amount of bonds hereby secured which may be executed
259 by the railroad company, and which may be certified by the trustee, is limited so that never at any time shall there be outstanding bonds hereby secured for an aggregate principal sum exceeding $50,000,000. All of such bonds shall be dated April 1, 1903; but in no instance shall the interest upon any such bond begin to accrue from a date earlier than the first day of April or the first day of October, as the case may be, next preceding the day of the certification thereof. The trustee shall not certify or deliver any coupon bond hereby secured, until all coupons thereof then matured shall have been detached and shall have been canceled. The trustee shall not certify or deliver any registered bond without coupons until there shall have been inserted therein the date from which interest is to accrue, which date shall be the first day of April or the first day of October, as the case may be, next preceding the day of the certification thereof, except as provided in section 6 of this article one.

Only such of said bonds as shall bear thereon a certificate substantially in the form hereinbefore recited, duly executed by the trustee, shall be secured by this indenture, or shall be entitled to any lien or benefit hereunder. No such bond nor any coupon thereunto attached shall be valid for any purpose until such certificate shall have been duly endorsed on such bond. Every such certificate of the trustee upon any bond executed by the railroad company shall be the conclusive and the only evidence that the bond so certified was duly issued hereunder, and is entitled to the benefit of the trust hereby created.

On request of the railroad company, but within the limitations hereinafter prescribed, bonds shall be certified and be delivered hereunder in advance of registration or recording of this indenture; but the railroad company with all convenient speed shall cause this indenture to be recorded as a mortgage upon railways.

Whenever, from time to time, any bonds certified by the trustee shall be deliverable by it according to the terms of this indenture
(excepting the $10,000,000 bonds, for the immediate delivery
260 whereof provision is hereinafter made in section 2 of this article), such bonds shall be delivered by the trustee as may be directed by resolution of the board of directors of the railroad company or of the executive committee thereof. A copy of any such resolution, certified by the secretary under the corporate seal, shall be full authority to the trustee for the certification and delivery of such bonds.

SEC. 2. Of the bonds authorized to be issued under and secured by this indenture, bonds for the aggregate principal sum of ten million dollars ($10,000,000), convertible at par into common stock of the

railroad company at 50 per cent of the par value of such stock, shall be executed by the railroad company and be delivered to the trustee for certification, and as soon as may be after the execution of this indenture, and without any further action on the part of the railroad company, shall by the trustee be certified and be delivered to the railroad company from time to time upon the written order of the railroad company signed by its president and its treasurer under the corporate seal.

SEC. 3. The remaining forty million dollars ($40,000,000), par value, of the bonds authorized to be issued under and secured by this indenture, shall be reserved to be executed by the railroad company and to be certified and delivered by the trustee from time to time after December 31, 1903, for some one or more of the purposes specified in this section, but only as herein provided, and subject to the restrictions herein stated.

Such reserved bonds may be issued in one or more series. The board of directors of the railroad company from time to time shall determine the amount of bonds to be issued in any series, and shall fix the price or rate at which shares of the common stock of the railroad company will be issued in and upon conversion of the bonds of such series, when the right to demand such conversion shall be exercised by the holder of any such bond; but in no instance shall
261 such price or rate be less than the market price of such shares on February 11, 1903. The price or rate of conversion, as so fixed by the board of directors, shall be stated in every bond issued hereunder, and shall be alike in every bond of the same series.

A. The purposes for which such $40,000,000 of reserved bonds from time to time shall be executed, cetrified, and delivered, and for which such bonds or their proceeds may be used, are:

(a) The construction or acquisition after December 31, 1903, of branch or connecting lines of railroad and extensions; and of ferry houses, ferry boats, shops, depots, terminal properties, rolling stock and other equipment, and other acquisitions, additions, improvements, and betterments, upon, along or appertaining to, or for use in connection with, any lines of railway, branches, or terminal properties, which, at the time of such construction or acquisition, shall belong to the railroad company and be subject to the lien of this indenture, or shall belong to any other company of whose capital stock at least ninety per cent in amount shall then be subject to this indenture (whether or not subject to the prior lien of the said first consolidated mortgage deed dated December 14, 1895, or of the said indenture dated February 1, 1901), or upon, along, or appertaining to, or for the use in connection with, the lines of railway of the Paterson and Hudson River Railroad Company, the Paterson and Ramapo Railroad Company, the Union Railroad Company, the New York and Greenwood Lake Railway Company, the Northern Railroad Company of New Jersey, the Cleveland and Mahoning Valley Railroad Company, the Sharon Railway, the Westerman Railroad, or the Elmira State Line Railroad Company; and to reimburse the

railroad company for sums expended by it, or by any such other company, after December 31, 1903, for any of the foregoing purposes.

(b) The acquisition after December 31, 1903, of shares of
262 the capital stock, bonds, or other indebtedness of any company owning any branch or connecting lines of railroad or extensions; or any ferry houses, ferry boats, shops, depots, or terminal properties such as are specified in the foregoing clause (a), provided that no bonds or their proceeds shall be used for the acquisition of any shares of the capital stock, bonds, or other indebtedness, for the purchase and acquisition of which any bonds have been reserved under the provisions of said first consolidated mortgage deed of December 10, 1895; and provided, further, that no bonds shall be used for the purchase of shares of the capital stock, bonds, or other indebtedness of any company unless or until the greater part of the entire capital stock of such company shall be acquired or shall have been acquired, and that all the shares, bonds, and other indebtedness so acquired shall become and shall be subject to the lien of this indenture, whether or not also subject to the prior lien of said first consolidated mortgage deed dated December 10, 1895, or of said indenture of February 1, 1901; and provided, further, that no shares, bonds, or other indebtedness issued or created by any such company after such ninety per cent of the capital stock thereof shall have become subject to this indenture, shall be acquired under this clause (b); but bonds may be certified and delivered under the foregoing clause (a) in respect of any construction or acquisition such as is specified in said clause, by any such company, and to reimburse the railroad company for sums expended by it after December 31, 1903, for any such acquisition.

B. The restrictions subject to which such $40,000,000 of reserved bonds from time to time shall be certified and delivered, are as follows, viz:

(1) Before certifying and delivering bonds under this section, there shall be delivered to the trustee a copy of a resolution of the board of directors of the railroad company, certified by its secretary or an assistant secretary, calling for the certification and
263 delivery of a specified amount of such bonds, and directing the officers of the railroad company to set aside such amount of bonds or their proceeds separte and apart from any other assets and funds of the railroad company, and to use the same only for purposes authorized by this section.

(2) In each calendar year after December 31, 1903, there shall be so certified and delivered out of such $40,000,000 of bonds, such amount not in the aggregate exceeding ten million dollars ($10,000,000) par value in any calendar year, as from time to time shall be called for in such resolutions; but in every instance except the first, before certifying or delivering any of the bonds reserved under this section, the trustee shall require the railroad company to furnish, in addition to such resolution of its board of directors, the certificate or certificates of some officer or officers of the railroad company, stating:

(a) That all bonds certified and delivered under this section in respect of which no such certificate previously shall have been furnished, and the proceeds of all such bonds, have been actually used, or actually appropriated and set aside for liabilities actually incurred, for said purposes or for some one or more of them, or to reimburse the railroad company as aforesaid—indicating the particular branches, extensions, terminal properties, rolling stock, or other property, acquired or constructed or contracted for, or the stock, bonds, or other indebtedness of any other company acquired, and the kind or class of betterments or improvements made or contracted for, and the amount of bonds or proceeds of bonds or other cash, used or applied or actually appropriated and set aside for each such purpose;

(b) That the price paid or liability incurred for such construction, or for such acquisition, betterments, or improvements, was not in excess of the fair value of such property or of such work, and
264 that the bonds included in such certificate were sold, disposed of or otherwise accounted for, at not less than their fair market value at the time of such sale, disposition, or accounting;

(c) That no part of such certified expenditures or liabilities was included in any previous certificate furnished hereunder, or was made or reimbursed or provided for out of any bonds or moneys received by the railroad company under any other provision of this indenture, or under any provision of the first consolidated mortgage deed dated December 10, 1895, or of the said indenture dated February 1, 1901;

(d) That no part of the expenditures certified in such certificate was included in the operating or maintenance expenses reported in any annual report theretofore issued by the railroad company;

(e) In case such certificate shall show the acquisition of, or any contract for, new property, then such certificate also shall state whether such new property is known or believed to be, or that when acquired such new property will be, subject to any lien or charge prior to this indenture, except prior liens and charges to which the grant of this indenture is made subject, and undetermined liens or ordinary operating accounts or charges incidental to construction, and such certificate shall specify the amount of any such prior lien or charge (other than as aforesaid) known or believed to exist or intended or expected to be created;

(f) Any such certificate under this section may state any other facts pertaining to the right to certify and deliver bonds hereunder. The same officer or officers of the railroad company need not certify to all the facts required to be certified under the provisions of this section, but different officers may certify to different facts, respectively.

265 (3) None of the $40,000,000 of reserved bonds deliverable after December 31, 1903, pursuant to this section 3, shall be certified and delivered for or in respect of the construction or acquisition of property subject to any lien or charge so certified, unless or

until the railroad company shall have deposited with the trustee an amount of bonds hereby secured equal at par to the aggregate amount of such certified indebtedness, liens and charges. Whenever thereafter any of such certified indebtedness, liens and charges shall be paid or be satisfied, or shall be acquired and be subjected to the lien hereof, then an equal amount at par of the bonds hereby secured so deposited with the trustee under this clause shall be redelivered by the trustee to the railroad company or upon its order, so that the amount of such bonds held by the trustee under this clause at all times shall be equal to the amount of such indebtedness, liens and charges remaining unsatisfied or not subjected to the lien thereof.

(4) The railroad company covenants that whenever all the bonds reserved under this section shall have been certified and delivered to, and used by, the railroad company, it will execute and deliver to the trustee a similar certificate indicating the particular application of all such bonds, or proceeds of such bonds, in respect of which the railroad company shall not theretofore have furnished such certificate to the trustee.

(5) Every such certificate furnished under this section, unless signed, first, by the president or a vice-president or the general manager or the chief engineer, and, secondly, by the comptroller or auditor or treasurer, of the railroad company, shall have endorsed thereon, or shall be accompanied by, a written statement of one of the officers first above designated, and one of the officers secondly above designated, that they believe that such certificate is true, and that such bonds or their proceeds have been used, and the expenditures certified
266 have been made, only for purposes authorized by this section. A certificate signed by one of the officers first above designated and one of the officers secondly above designated, or a certificate having endorsed thereon or annexed thereto a written statement of such officers in the form in this paragraph specified, shall be received by the trustee as conclusive evidence of any facts pertaining to the right to certify and deliver bonds pursuant to this section.

Unless the bonds or the certificates for shares of stock or the other indebtedness acquired under the provisions of this section, shall be deliverable and shall have been delivered to the trustee under the said first consolidated mortgage deed dated December 10, 1895, or to the trustee under the said indenture dated February 1, 1901, such bonds, and such certificates of stock, endorsed for transfer in blank, and the assignments of such other indebtedness, shall be delivered to the trustee hereunder, together with the said statements and certificates, and the railroad company shall execute or shall cause to be executed any conveyances or instruments of further assurance that may be necessary for the purpose of subjecting to the lien and operation of this indenture any new property so acquired by the railroad company, and, so far as may be, any indebtedness, liens or charges so taken up or acquired by use of said bonds, and, also, in the case of any construction upon or acquisition for any of the railroads specifically referred to in part A of this section 3, the railroad company shall execute or

e to be executed such instruments as may be necessary to subject same to the leases, if any, under which such railroads are held: also shall furnish the written opinion of counsel for the railroad pany to the effect that such conveyances or other instruments are ient for that purpose or that no conveyance or instrument of her assurance is necessary for the purpose aforesaid. Such resolutions, statements, certificates, and opinion shall be deemed, and shall be taken to be, full authority and protection to the trustee for its certification of such bonds under the foregoing risions of this section.

EC. 4. Whenever, under section 3 of this article, the railroad pany shall be entitled to reimbursement out of bonds of any es hereby secured or their proceeds, the railroad company may and accept such bonds at prices to be fixed by the resolution of board of directors, but not in any case less than the average ket prices for bonds of the same series at the New York Stock hange during the previous calendar month (if there be any such ket price for such bonds) in settlement and discharge of its claim e reimbursed; and the bonds so taken and accepted by the rail- l company shall be held and may be used by it for its general porate purposes, freed and discharged from all restrictions and visions of said section 3 as though such bonds had been sold at price and the proceeds paid over to the railroad company.

EC. 5. Whenever any coupon bond or bonds, issued under and ired by this indenture, together with all unmatured coupons reto belonging, shall be surrendered for exchange for a registered d or registered bonds without coupons, the railroad company shall cute, and the trustee shall certify, and in exchange for such cou- bond or bonds shall deliver registered bonds, or one registered d, without coupons, for the like aggregate principal sum. The istered bond or bonds without coupons so delivered in exchange, ll be of the same series as the surrendered coupon bond or bonds, shall bear interest from the date of the last-matured coupon reof.

Whenever any registered bond without coupons shall be surren- ed, transferred, and canceled, as provided in section 3 of article two hereof, the railroad company, upon request therefor, shall issue to the transferee, and the trustee shall certify and shall deliver, registered bonds, or one registered bond without coupons, the same series, for the like aggregate principal sum.

Whenever any registered bond or bonds without coupons, for the ncipal sum of one thousand dollars or some even multiple of one usand dollars, shall be surrendered for exchange for a coupon d or bonds, the railroad company shall issue, and the trustee shall tify, and, in exchange for such registered bond or bonds without pons, shall deliver a coupon bond or coupon bonds of the same es, for the like aggregate principal sum, with coupons maturing and after the date when the next semiannual installment of erest would have been payable on such surrendered bond or bonds.

In every case of any such exchange, the trustee forthwith shall cancel the surrendered bond or bonds and coupons and shall deliver the same to the railroad company.

For (1) any exchange of coupon bonds for registered bonds, and for (2) any transfer of registered bonds without coupons, and for (3) any exchange of registered bonds without coupons for coupon bonds, the railroad company, at its option, may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge, and in addition thereto, such further sum as may be necessary to meet other expense connected therewith; such further sum, however, not to exceed one dollar for each new coupon bond or registered bond without coupons issued upon such exchange or transfer.

SEC. 6. In case any coupon bond issued hereunder with the coupons thereto appertaining, or any registered bond without coupons, shall become mutilated or be destroyed, the railroad company, in its discretion, may execute, and thereupon the trustee shall certify and deliver, a new bond of like tenor and date (including coupons in case of a coupon bond) bearing the same serial number, in exchange
269 and substitution for, and upon cancellation of, the mutilated coupon bond and its coupons, or the mutilated registered bond without coupons, or in lieu of and substitution for the coupon bond and its coupons or the registered bond without coupons so destroyed, upon receipt of satisfactory evidence of the destruction of such coupon bond and its coupons, or of such registered bond without coupons, and upon receipt also of satisfactory indemnity.

SEC. 7. Until the bonds to be issued under and secured by this indenture can be engraved and printed, the railroad company may execute, and, upon its request, the trustee shall certify and deliver, in lieu of such engraved bonds and subject to the same provisions, limitations, and conditions, temporary bonds of any denomination, substantially of the tenor of the bonds to be issued as hereinbefore provided. Upon surrender of such temporary bonds for exchange, the railroad company at its own expense shall issue, and upon cancellation of such surrendered bonds the trustee shall certify and deliver, in exchange therefor, engraved coupon bonds or registered bonds without coupons of the denominations hereinbefore provided, for the same aggregate principal sum as the temporary bonds surrendered; and, until so exchanged, the temporary bonds shall be entitled to the same security as the engraved bonds issued hereunder.

SEC. 8. Nothing in this indenture, or in the bonds issued hereunder, expressed or implied, is intended, or shall be construed, to give to any person or corporation other than the parties hereto, and the holders of bonds issued under and secured by this indenture, any legal or equitable right, remedy, or claim under or in respect of this indenture, or under any covenant, condition, or provision herein contained; all its covenants, conditions, and provisions being intended to be, and being, for the sole and exclusive benefit of the parties hereto, and of the holders of the bonds hereby secured.

ARTICLE TWO.

The railroad company covenants as follows:

SECTION 1. Duly and punctually it will pay the principal and the erest of every bond issued under this indenture, at the dates and the ace and in the manner mentioned in such bonds or in the coupons ereto belonging, according to the true intent and meaning thereof, thout deduction from either principal or interest for any tax or es which the railroad company or the trustee may be required to y or to retain therefrom, under or by reason of any present or ture law of the United States, or of any State or county or municility therein. The interest on the coupon bonds shall be payable y upon presentation and surrender of the several coupons for such erest as they respectively mature, and when paid such coupons shall thwith be canceled. The interest on the registered bonds without upons shall be payable only to the registered holders thereof.

Duly and punctually the railroad company will also pay the prinal and the interest of every bond issued under the said first consoli-ted mortgage deed dated December 10, 1895, and of every bond ued under the said indenture dated February 1, 1901, according to terms of said bonds and coupons and of said indentures securing same, severally and respectively.

SEC. 2. All railways, franchises, and other property of every kind, respect of the acquisition or construction whereof bonds under this lenture hereafter shall be certified and be issued as hereinbefore ovided, and all franchises and other property of every kind as deibed and to the extent provided in the granting clauses of this lenture, which hereafter may be acquired by the railroad company, immediately upon the acquisition thereof by the railroad company, and without any further conveyance or assignment, shall become and shall be subject to the lien of this lenture as fully and completely as though now owned by the railad company, and specifically described in the granting clauses reof; but at any and all times the railroad company will execute d deliver any and all such further assurances or conveyances or asnments thereof as the trustee may reasonably direct or require, the purpose of expressly and specifically subjecting the same to lien of this indenture; and also it will do, execute, acknowledge, d deliver, or cause to be done, executed, acknowledged, and delivd, all and every such further acts, deeds, conveyances and transfers d assurances in the law, for the better assuring, conveying, assigng, and confirming unto the trustee, all and singular, the hereditants and premises, estates, and property hereby conveyed or assigned, intended so to be, or which the railroad company may hereafter come bound to convey or assign to the trustee, as the trustee shall asonably require.

But nothing expressed or implied in this indenture is intended, or all be construed, to limit the right or power of the railroad comny, hereby distinctly reserved, by the use of its credit or in any

manner other than by the use of the bonds hereby secured, or their proceeds, to construct or acquire other lines of railway, branches, or extensions, or interests therein, or other property, free from the lien hereof.

SEC. 3. The railroad company, at an office or agency to be maintained by it in the city of New York, will keep a register or registers for the registration and transfer of bonds issued hereunder, in which it will register, subject to such reasonable regulations as it may prescribe, all such bonds without coupons, and, upon presentation thereof for such purpose, any such coupon bonds; and such register or registers at all reasonable times shall be open to the inspection of the trustee.

272 Upon presentation to the bond registrar of the railroad company, at the place where such register shall be kept, of any such registered coupon bond, accompanied by delivery of a written instrument of transfer in a form approved by the railroad company, executed by the registered holder, such bond shall be transferred upon such register by the registered holder, in person or by attorney, and such transfer shall be noted by such bond registrar upon the bond. The registered holder of any such registered coupon bond also shall have the right to cause the same to be registered as payable to bearer, in which case transferability by delivery shall be restored, and thereafter the principal of such bond when due shall be payable to the person presenting the bond; but any such coupon bonds registered as payable to bearer may be registered again in the name of the holder with the same effect as a first registration thereof. Successive registrations and transfers as aforesaid may be made from time to time as desired, and each registration of a coupon bond shall be noted by the bond registrar on the bond.

Registration of any coupon bond, however, shall not affect the transferability of any coupon thereto belonging, by delivery merely, and payment to the bearer of any such coupon shall discharge the railroad company in respect of the interest therein mentioned, whether or not the bond shall have been registered.

Any registered bond without coupons may be transferred upon such register at such office or agency by the registered holder, in person or by attorney, upon surrender of such bond to such bond registrar for cancellation, accompanied by delivery of a written instrument of transfer in a form approved of by the railroad company, duly executed by the registered holder of the bond; and thereupon a new registered bond, or new registered bonds, for an equivalent principal sum shall be issued to the transferee or transferees as provided in section 5 of article one hereof.

273 SEC. 4. The railroad company shall not and will not suffer or permit any default wherefor any of the several lessors may terminate any of the existing leases of the Cleveland and Mahoning Valley Railroad, the Sharon Railroad, or the Westerman Railroad, or any lease hereafter made to it or for its benefit, of any franchises or property now or hereafter belonging to any of the said railroad

companies. In case and whenever it shall make default in paying any sum stipulated to be paid in any such present or future lease of any of the said railroads, the trustee, without affecting any of its rights hereunder, from time to time, in its discretion, may itself pay any sum so in default, and thereupon shall have and forthwith may assert a lien for such advances upon the premises hereby mortgaged, and the proceeds thereof, which lien shall be entitled to priority in rank and payment from the income and profits of the mortgaged premises over any bonds hereby secured.

The railroad company will not voluntarily create or suffer to be created any debt, lien, or charge (except as permitted or required under the said first consolidated mortgage deed dated December 10, 1895, or under the said indenture dated February 1, 1901, severally and respectively) which would be prior to the lien of these presents upon the mortgaged or pledged premises and property or any part thereof, or upon the income thereof; and within three months after the same shall accrue it will pay, or will cause to be discharged, or will make adequate provision to satisfy and discharge all lawful claims and demands of mechanics, laborers, and others, which, if unpaid, might by law be given precedence to this indenture as a lien or charge upon the mortgaged premises or any part thereof or the income thereof; and if any company of whose capital stock the greater part, pursuant to the provisions of article one or to the provisions of sections 5 and 6 of article three of this indenture, shall have been pledged hereunder, at any time while the greater part of the capital stock of such company shall be pledged hereunder
274 (excepting the New York, Susquehanna and Western Railroad Company, or the Buffalo Creek Railroad Company, or the Blossburg Coal Company, or the Conesus Lake Railroad Company), shall create or shall suffer to be created (except as permitted or required under the two indentures above mentioned, or under this indenture, or as required by any existing obligation) any lien or charge upon its property or income, or any indebtedness other than indebtedness to the railroad company, or for the current operating expenses of such company during a period not exceeding three months, then it (the railroad company) will cause the same to be paid or discharged, or will make adequate provision for the satisfaction or discharge thereof; provided, however, that the railroad company shall have the right to contest by legal proceeding any such debt, lien, or charge, and pending such contest may delay or defer the payment or discharge thereof.

SEC. 5. The railroad company from time to time will pay and discharge all taxes, assessments, and governmental charges (the lien whereof would be prior to the lien hereof) lawfully imposed upon the premises or properly subject to this indenture, or upon any part thereof, or upon the income and profits thereof, and also all taxes, assessments, and governmental charges lawfully imposed upon the lien or interest of the trustee in respect of such premises or property, so that the lien and priority of this indenture shall be fully pre-

served at the cost of the railroad company without expense to the trustee or the bondholders; and if any company of whose capital stock the greater part pursuant to article one or article three of this indenture shall have been pledged hereunder, at any time while the greater part of the capital stock of such company shall be pledged hereunder (except the Buffalo Creek Railroad Company, or any coal company, in respect of lands upon which mining shall have been aban-
275 doned), shall fail to pay all such taxes, assessments, and charges lawfully imposed upon the property of such company or upon the income and profits thereof, then the railroad company itself will pay the same or make adequate provision for the satisfaction or discharge thereof; provided, however, that the railroad company shall have the right to contest by legal proceeding any such tax, assessment, or charge, and pending such contest may delay or defer the payment thereof.

SEC. 6. Except in the cases in this indenture expressly authorized, the railroad company will not, by affirmative vote or by abstaining from voting, sanction or permit any increase of the capital stock of any company of whose capital stock the greater part shall be subject to this indenture, or the issue or guaranty of any bonds by any such company, or the creation of any mortgage or other lien upon the railroad or property of any such company, unless simultaneously there shall be made effective provision that such indebtedness and the evidences thereof, and such bonds issued or guaranteed, and such mortgage or other lien, and all such additional stock (or such part of such additional stock as shall be proportionate to the part of such entire capital stock previously subject to this indenture), forthwith, upon the issue or creation thereof, shall be delivered to, and be pledged with, the trustee under the said first consolidated mortgage deed dated December 10, 1895, or with the trustee under the said indenture dated February 1, 1901, if required by said instruments, severally and respectively, or with the trustee hereunder, and shall be subject to all the trusts of this indenture; and all such additional stock shall be fully paid and nonassessable. Nothing herein, however, shall be construed to prohibit any increase of stock of, or the creation of mortgages or other liens by, the Buffalo Creek Railroad Company or the New York, Susquehanna and Western Railroad Company.

Except as herein otherwise expressly provided, the railroad
276 company will not, by affirmative vote or by abstaining from voting, sanction or permit any railroad or ferry or terminal company, of whose capital stock the greater part shall be owned by the railroad company and be subject to this indenture, to sell or otherwise to dispose of its railroad or any part thereof, or any ferry or terminal, or to lease the same (unless such lease be upon the condition that it shall terminate, at the election of the trustee, by entry or otherwise, in case default shall be made and shall continue as provided in section 2 of article four hereof, or, at the election of the purchaser, in case of a sale of the property subject to this indenture, under this indenture or under either of said two former indentures,

dated respectively December 10, 1895, and February 1, 1901), except to the railroad company or to some other company of whose capital stock not less than ninety per cent shall then be held by the railroad company and be subject to this indenture.

SEC. 7. Any and all claims and indebtedness, which the railroad company now has or hereafter may acquire against any other company, of whose capital stock the greater part shall have become subject to this indenture, shall (subject to the provisions in respect thereof in this indenture contained) be and become subject to this indenture, and if and when requested in writing by the trustee, the railroad company will execute to the trustee appropriate assignments thereof: subject, however, to any prior rights of the trustee under the said first consolidated mortgage deed dated December 10, 1895, or of the trustee under the said indenture dated February 1, 1901.

SEC. 8. The railroad company will not issue, negotiate, sell or dispose of any bonds hereby secured in any manner other than in accordance with the provisions of this indenture and the agreements in that behalf herein contained; and in issuing, selling, negotiating or otherwise disposing of such bonds, from time to time, it will
277 well and truly apply, or cause to be applied, the same, or the proceeds thereof, to and for the purposes herein prescribed, and to or for no other or different purpose.

SEC. 9. Prior to the first day of April, 1905, the railroad company will authorize the increase of its common capital stock to such amount as may be necessary to provide for the conversion thereinto of all of the bonds issued hereunder in accordance with the terms thereof; and, when and as demand therefor after April 1, 1905, and before April 1, 1915, shall be made by the holder of any such bond, it will as soon as practicable issue certificates for such shares of common stock as the same shall then be constituted, in exchange for, and in conversion of, such bond at the rate stipulated therein, but never at a rate less than the market price of such common stock on February 11, 1903; provided, however, that in case the voting trust of the stock of the railroad company under a certain agreement dated January 1, 1896, between Charles H. Coster, Louis Fitzgerald, and Anthony J. Thomas, of the one part, and J. Pierpont Morgan, Louis Fitzgerald, and Sir Charles Tennant, Bart., voting trustees, of the other part, or any extension or renewal of said agreement, shall exist at the time of any such conversion, common stock voting trust certificates shall be deliverable in lieu of common stock certificates; and provided further that scrip may be delivered for any fraction of a share of common stock, which scrip shall be exchangeable for common stock certificates, or common stock voting trust certificates, as the case may be, when presented in amounts aggregating $100 or some even multiple thereof, but which, until so exchanged, shall not confer on the holder the right to receive any dividends declared on such common stock, or any right whatever other than such right of exchange.

Demand by the holders of bonds for the conversion thereof
278 into common stock shall be made by writings addressed to the railroad company, which shall be delivered, together with the bonds to be converted, to the bond registrar of the railroad company. If the bond so surrendered be a registered bond without coupons, all rights to interest subsequently payable shall cease and determine. If the bond so surrendered be a coupon bond, the holder shall also surrender all unmatured coupons thereof. All registered bonds (with or without coupons) shall bear a written assignment in blank in a form satisfactory to the railroad company.

Upon the conversion and exchange of any such surrendered bond as above provided, the railroad company forthwith will cancel such surrendered bond (and also all unmatured coupons thereof if it be a coupon bond), and will exhibit the same to the trustee; and thereupon the said bond shall be deemed to be and shall be satisfied and discharged, and no bond in place thereof shall be issued by the railroad company or be certified or be delivered by the trustee.

ARTICLE THREE.

SECTION 1. It is hereby declared and covenanted that until the final satisfaction or release of the said first consolidated mortgage deed dated December 10, 1895, and of the said indenture dated February 1, 1901, all the bonds, stocks, and other property covered by said indentures, severally and respectively, shall be and shall remain subject to the prior and superior lien thereof, and shall be held as provided in said indentures, severally and respectively, and with all the powers, rights, and discretions, and subject to all the provisions set forth in said indentures, severally and respectively; and neither the execution of this indenture, nor any action hereunder, shall in any manner affect said indentures or either of them, or any rights of the holders of the bonds thereby secured, or any rights or duties of the trustee under either of said indentures.

279 Whenever said indenture dated February 1, 1901, shall have been satisfied or released, the trustee hereunder shall be entitled to receive, to take possession of, and to hold, as trustee under this indenture, all the bonds, shares of stock and other property (including cash) then held by the trustee under said indenture dated February 1, 1901; and the railroad company covenants that it will execute and will deliver to the trustee hereunder such assignments, transfers, powers of attorney, and other instruments as the trustee may reasonably require in order to vest in the trustee hereunder, or in order to enable the trustee hereunder to acquire, the title and possession of all such bonds, shares of stock, and other property; and the trustee thereupon shall hold under this indenture all such bonds, shares of stock, and other property, including cash.

The railroad company covenants that forthwith upon the execution hereof it will cause due notice of the execution of this indenture to be given to each corporation or association which issued any of the

shares of stock or any of the bonds now held by the trustee under either of said two former indentures; and from time to time, upon the delivery to the trustee under either of said indentures, of stocks, bonds, or other obligations of any other corporation or association, it will give similar notice to such other corporation.

The trustee shall be authorized (1) to cause to be registered in its name as trustee, any and all coupon bonds pledged with and delivered to it hereunder, or which at any time hereafter may be received by it under any of the provisions of this indenture, or (2) to cause the same to be exchanged for registered bonds without coupons of any denomination, or (3) to cause any such bonds to be stamped "Not negotiable. Held by The Standard Trust Company of New York, as trustee under the general mortgage of Erie Railroad Company, dated April 1, 1903."

The trustee shall cause to be transferred into its name, as
280 trustee hereunder, all registered bonds which shall have been delivered and assigned to it hereunder. The trustee at any time may transfer into its name, as trustee hereunder, all or any shares of stock the certificates for which shall have been pledged with and delivered to it hereunder, or in its discretion it may hold such certificates in the name of the registered holder thereof at the time of such pledge, provided that the same be endorsed in blank for transfer.

The trustee may do whatever may be necessary for the purpose of maintaining, preserving, renewing, or extending the corporate existence of any company the greater part of whose shares shall then be held by the trustee hereunder, and for such purposes, from time to time, it may sell, assign, transfer, and deliver so many shares of the stock of the several companies as may be necessary to qualify persons to act as directors of, or in any other official relation to, said companies. Whenever requested in writing by the railroad company the trustee shall assign and transfer to persons designated by the railroad company a sufficient number of any shares that then shall be held by the trustee hereunder to qualify such persons to act as directors of, or in any official relation to, the several companies which issued such shares; provided, however, that under this provision no transfer shall be made which shall reduce the amount of stock in any company held by the trustee so as to render it less than a controlling interest in such stock; and in every case the trustee may make such arrangements as it shall deem necessary for the protection of the trust hereunder.

Until the final satisfaction or release of said indentures dated December 10, 1895, and February 1, 1901, severally and respectively, unless the railroad company either (1) shall be in default in the payment of any interest upon any bond or bonds hereby secured and then outstanding, and such default shall have continued for the
281 period of six months, or (2) shall be in default in the payment of the principal of any bond hereby secured; or (3) shall be in default in the payment of the principal of any of the bonds

secured by the said indenture dated February 1, 1901; or (4) shall be in default in the due observance or performance of some other covenant or condition in this indenture required to be kept or performed by the railroad company, and such last-mentioned default shall have continued for the period of six months after written notice thereof shall have been given by the trustee to the railroad company, all stocks, bonds, coupons, claims, and other property that shall be subject to either of said indentures dated December 10, 1895, and February 1, 1901, severally and respectively, except as herein expressly otherwise provided, may be used, held, dealt with, and disposed of under and in accordance with the provisions of article four of said indenture dated December 10, 1895, and of article three of said indenture dated February 1, 1901, severally and respectively, as well by the railroad company as by the several trustees under said indentures, respectively, as though this indenture had not been made. None of the particular provisions hereinafter contained shall be construed as limiting the general provision contained in this section.

SEC. 2. Unless and until a receiver shall have entered into possession of the railroad hereby mortgaged and conveyed; or unless the trustee shall have entered into possession of the mortgaged premises or part thereof under the power herein granted; or unless and until there shall be a default (1) in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture and such default shall have continued for the period of six months; or (2) in the payment of the principal of any bond hereby secured; or (3) in the payment of the principal of any of the bonds secured by the said indenture dated February 1, 1901; or (4) in the due
282 observance or performance of any other covenant or condition in this indenture required to be kept or performed by the railroad company and such last-mentioned default shall have continued for the period of six months after written notice thereof shall have been given by the trustee to the railroad company, (a) the trustee shall not (except with the assent of the railroad company) collect, or be entitled to collect, the principal or interest of any bonds or of any other claims or indebtedness now or hereafter subject to this indenture, whether at, or before, or after the maturity of such bonds or contract obligations or other claims or indebtedness, and shall not enforce any provisions of the mortgages, trust deeds or other instruments under which such bonds or other obligations were issued, or by which the same are secured; (b) the railroad company shall be entitled to receive all interest paid in respect of any such bonds or obligations, and the dividends on all shares of stock, which shall be subject to this indenture, although the same may have been transferred to the trustee; (c) from time to time (subject to the covenants in respect thereof in this section contained), upon the request of the railroad company, the trustee shall deliver to it any coupons for such interest then in the possession of the trustee, in order that the railroad company may receive payment thereof for its own use or may cause the same to be canceled, and the trustee shall deliver to the railroad com-

pany suitable orders in favor of the railroad company, or its nominee, for the payment of such interest and dividends, and the railroad company may collect such coupons, interest, and dividends (but not by any proceeding which the trustee shall deem to be prejudicial to the trusts hereunder), and the trustee at once shall pay over to the railroad company any such interest and dividends which may be collected or be received by it; and (d) the railroad company, for its own use, shall be entitled to demand, receive, and collect, and may
283 release and discharge, the principal and interest of any such claims and indebtedness subjected to the lien of this indenture under section 7 of article two hereof, and upon request of the railroad company the trustee shall execute any reassignments or releases which may be required for that purpose:

Provided, however, and hereby it is declared and agreed that, except as in this indenture otherwise expressly provided, (1) the railroad company shall not be entitled to receive, and the trustee shall not pay over to the railroad company, the principal of any bond subject to this indenture; (2) the railroad company shall not be entitled to receive, and the trustee shall not pay over, any interest on any such bond, or the principal of or any interest on any such other obligations, claims, or indebtedness which shall have been collected or paid out of the proceeds of any sale or condemnation of the property covered by a mortgage securing such bonds, or out of the proceeds of the sale of any other property of the company liable upon such bonds, obligations, claims, or indebtedness, in case of a dissolution or liquidation of such company, it being the intention that the railroad company shall be entitled to receive only payments made out of the rents, revenues, income, or proceeds of operation of such properties; (3) the railroad company shall not sell, assign, or transfer any such coupon or right to interest or dividends delivered or assigned to it, or any other such claim or indebtedness, except subject to this indenture; (4) the railroad company shall not collect any such coupons or interest or any such other claims or indebtedness by legal proceedings or by enforcement of any security therefor, except with the assent of the trustee, nor in any manner which the trustee shall deem prejudicial to the trust hereunder; and (5) until actually paid, released, or discharged every such coupon or right to interest or dividends and all such other claims and indebtedness shall remain subject to this indenture.

284 If any such coupons, or if any evidence of any such claim or indebtedness, delivered to the railroad company hereunder, shall not, as aforesaid, forthwith be paid or canceled, the railroad company shall return the same to the trustee, and in case of the payment of any such coupon, claim, or indebtedness shall, upon the demand of the trustee, furnish satisfactory evidence of the cancellation and extinguishment thereof.

SEC. 3. In case any sum shall be paid on account of the principal of any bonds or of any obligations subject to this indenture, or in case any sum shall be paid on account of the interest on any such bonds

or obligations, out of the proceeds of property covered by a mortgage or trust deed securing such bonds or obligations, or in case, upon the dissolution or liquidation of any company, any sum shall be paid upon any bonds or any shares of stock or any claims against or indebtedness of such company, subject to this indenture, then, in any such case, any such sum, unless received by the trustee under the said first consolidated mortgage deed dated December 10, 1895, or by the trustee under the said indenture dated February 1, 1901, upon the trusts thereof, severally and respectively, or unless applied on account of the purchase price of property purchased pursuant to section 5 of this article, shall be received by the trustee and shall be paid over by the trustee to the railroad company to reimburse it for expenditures by it made for any of the purposes for which bonds or their proceeds may be used under section 3 of article one hereof, upon certificates of such expenditures, signed by the president or a vice-president or the general manager or chief engineer and by the comptroller or auditor or treasurer of the railroad company.

SEC. 4. Unless and until a receiver shall have entered into possession of the railroad hereby mortgaged and conveyed, or unless the trustee shall have entered into possession of the mortgaged
285 premises or part thereof under the power herein granted, or unless and until there shall be a default (1) in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture and such default shall have continued for the period of six months, or (2) in the payment of the principal of any bond hereby secured, or (3) in the payment of the principal of any of the bonds secured by the said indenture dated February 1, 1901, or (4) in the due observance or performance of some other covenant or condition in this indenture required to be kept or performed by the railroad company, and such last-mentioned default shall have continued for the period of six months after written notice thereof shall have been given by the trustee to the railroad company, the railroad company shall have the right to vote upon all shares of stock subject to this indenture for all purposes not inconsistent with the provisions or purposes of this indenture and with the same force and effect as though such shares were not subject to this indenture; and from time to time, upon demand of the railroad company, the trustee forthwith shall execute and deliver, or shall cause to be executed and delivered, to the railroad company, or to its nominees, suitable powers of attorney or proxies to vote upon any shares of stock which shall have been transferred to the trustee.

SEC. 5. In case default shall be made in the payment of the principal or interest of any of the bonds or obligations which shall have been delivered to, and shall be held by the trustee hereunder, or of any other bonds then secured by the same mortgage or deed of trust as such bonds held by the trustee, then in any such case, if the trustee shall hold more than ninety per cent in amount of the entire issue of such bonds or obligations in default, it shall, upon the written request of the railroad company, and in other cases, upon such written

request, it may, in its discretion, cause proper proceedings to be instituted and prosecuted in some court of competent jurisdiction to
286 foreclose or enforce the mortgage, or trust or charge by which such bonds or obligations in default are secured. In case the railroad company shall be in default in the payment of the principal of any of the bonds hereby secured, or in case the railroad company shall be in default in the payment of the interest on any of such bonds, and such default in the payment of interest shall have continued for the period of six months, or in case a receiver of the mortgaged premises shall have been appointed, or in case the trustee shall have entered or shall have elected to enter into possession of the mortgaged premises, either under the power herein conferred or by the voluntary action of the railroad company, then and in any such case the trustee, in its discretion, may institute such proceedings without such written request.

In case (1) any company of whose capital stock the greater part shall be held by the trustee subject to this indenture as a first lien thereon shall be dissolved or liquidated, or in case (2) all or any of the property of any such company shall be sold upon the insolvency of such company at any judicial or other sale, or in case (3) any property, covered by a mortgage securing any bonds, or subject to any charge or trust for the payment of any other obligations, held by the trustee subject to this indenture as a first lien thereon, shall be sold upon foreclosure of such mortgage, or by enforcement of such charge or trust, then in any such event, if the property of such dissolved or liquidated company, or the property sold, can be acquired by crediting on the bonds, obligations, claims, indebtedness, or stock held by the trustee hereunder, any sum accruing or to be received thereon out of the proceeds of such property, and by paying not more than ten per cent of the price of such property in cash (or more than ten per cent, if the holders of a majority in amount of the bonds hereby secured shall so request), the trustee in its discretion may, but, if requested in writing by the railroad company or by the
287 holders of a majority in amount of the bonds hereby secured, and provided with the amount of cash necessary therefor (whether such amount be more or less than ten per cent of the price of such property), the trustee in every case shall purchase or cause to be purchased, or permit the railroad company to purchase, such property, either in the name or on behalf of the trustee or of the railroad company, or by purchasing trustees, and shall use, or permit the railroad company to use, such bonds, obligations, claims, indebtedness, and stock, so far as may be, to make payment for such property; and in case of any such purchase the trustee shall take such steps as it may deem proper to cause such property to be vested either in the railroad company, subject to this indenture, or in some other corporation organized or to be organized, with power to acquire and manage such property, provided that all the bonds and other indebtedness and capital stock thereof (excepting the number of shares required to qualify directors) shall be received by the trustee and shall be

held for the benefit of the railroad company, or its assigns, subject to this indenture.

With the written consent of the railroad company, the trustee at any time may vote upon any shares of stock that shall be held by it hereunder, and may take such other action as in its discretion it shall deem advisable to protect its interests and the interests of the bondholders hereunder, in respect of any bonds, obligations, or stocks subject to the lien hereof, and with such consent of the railroad company, the trustee may join in any plan of reorganization in respect of any such bonds or stocks and may accept new securities issued in exchange therefor under such plan. In case the railroad company shall be in default in the payment of any interest or the principal of any of the bonds hereby secured and such default shall have continued for the period of six months, the trustee shall be entitled to take such steps without the consent of the railroad company.

The railroad company covenants that, on demand of the
288 trustee, it, the railroad company, forthwith will pay, or will satisfactorily provide for, all expenditures incurred by the trustee under any of the provisions of this section, including all sums required to obtain and perfect the ownership and title to any property which the trustee shall purchase or shall cause to be purchased pursuant to the provisions of this section; and in case the railroad company shall fail so to do, then, without impairment of, or prejudice to, any of its rights hereunder by reason of the default of the railroad company, the trustee, in its discretion, may advance all such expenses and other moneys required, or may procure such advances to be made by others, and for such advances made by the trustee, or by others at its request, with interest thereon, the trustee shall have a lien prior to these presents upon all the stocks, bonds, claims, and indebtedness in respect of which such advances shall have been made, and the proceeds thereof and any property acquired by means thereof.

In case the trustee shall not purchase or cause to be purchased the property sold at any such sale, and shall not join in a plan of reorganization as aforesaid in respect of such bonds or stocks, then the trustee shall receive any portion of the proceeds of the sale accruing on the securities by it held hereunder, and such proceeds, from time to time, shall be paid over to the railroad company to reimburse it for expenditures by it made for any of the purposes for which bonds or their proceeds may be used under section 3 of article one hereof, upon certificates of such expenditures signed by the president or a vice-president or the general manager or chief engineer, and by the comptroller or auditor or treasurer, of the railroad company.

SEC. 6. Anything in this indenture to the contrary notwithstanding, any company all or part of whose capital stock shall be subject to
289 this indenture, may be merged or consolidated with, or all or any part of its property may be sold or conveyed to, the railroad company. In the event of such consolidation or merger or sale, this indenture shall become and be a lien upon the property of the company so consolidated or merged with, or the property so

ld or conveyed to, the railroad company, with the same force and fect as if expressly conveyed by this indenture, and the holders of e bonds hereby secured shall always have as full and complete a en upon such property as that herein created by the pledge of the ock and bonds of such constituent companies or of such selling com- any, to the trustee hereunder.

Anything in this indenture to the contray notwithstanding any mpany, all or part of whose capital stock shall be subject to this denture, may be merged or be consolidated with, or all of its roperty may be sold or conveyed to, any other company, all or part whose capital stock shall be subject to this indenture; provided, owever, that the portion of the capital stock of any such consoli- ated or merging company (but never less than a majority thereof) sued for and in lieu of any stock previously pledged hereunder, all always bear to the total capital stock a proportionate relation least as high as that borne by such previously pledged stock to e total capital stock of such constituent companies; and provided rther that in the case of any such sale by any such company of l its property, the portion of the capital stock of the purchasing mpany (but never less than a majority thereof) subject to this denture, shall always bear to the total capital stock of such pur- asing company a proportionate relation at least as high as that rne by the previously pledged stock of the selling company to e total capital stock of such selling company. Such portion of such ock of such consolidated or merging company shall then become and subject to this indenture, and shall be held by the trustee here- nder pursuant to the provisions hereof, or by the trustee under the first consolidated mortgage deed dated December 10, 1895, 00 or by the trustee under the indenture dated February 1, 1901, pursuant to the provisions thereof, severally and respectively, nd the holders of the bonds hereby secured shall always, subject the lien of said two former indentures last above mentioned, have lien upon such portion of such stock of such consolidated or erging company as full and complete as upon the stock of such nstituent companies, by reason of the pledge hereunder.

The trustee holding the same may make and exchange, substitution, ancellation, or surrender of securities required for the purposes r in accomplishment of any such merger or consolidation; and the rustee hereunder may receive the opinion of any counsel approved y it as to the legal effect of any such merger or consolidation, and s to the steps necessary to be taken to consummate the same, and s to any other matter under this section; and such opinion shall e full protection to the trustee for any action by it taken pursuant ereto.

SEC. 7. Nothing in this indenture contained shall prevent (1) the enewal or extension, if without impairment of lien or security, t the same or a lower rate of interest, (a) by the railroad company f any bond or obligation secured by a mortgage or charge under- ying the lien of the said first consolidated mortgage deed dated

December 10, 1895, or of the said indenture dated February 1, 1901, or secured by a mortgage or lien permitted to be created under the provisions of either of said indentures or of this indenture; or (b) by any company any of the shares of whose capital stock shall be subject to this indenture, of any bond or obligation secured by mortgage upon its property; or (c) by any company of any of its bonds or obligations which shall be subject to this indenture; or (2) the issue in place of and in substitution for any such bonds or obligations of the railroad company or of any such other company, of other bonds or obligations for equivalent amounts, bearing the same or a
291 lower rate of interest, adequately secured by a similar mortgage or lien upon the same property; provided, however, that in case any bonds or obligations subject to this indenture shall be so renewed or extended, such bonds or obligations as so renewed or extended shall continue subject to this indenture to the same extent, and shall be lodged and held in the same manner as theretofore; and that in case any bonds or obligations subject to this indenture shall be exchanged for bonds or obligations substituted as aforesaid, the substituted bonds or obligations shall ipso facto forthwith become subject to this indenture to the same extent, and shall be lodged and held in the same manner as those for which they are substituted.

At any time, in its discretion, the trustee may, and if requested in writing by the railroad company it shall, consent to any such renewal, extension, or substitution. The trustee may receive the opinion of any counsel approved by it as conclusive evidence that any such renewal, extension, or substitution is in compliance with the provisions of this section.

ARTICLE FOUR.

SECTION 1. Neither any coupon belonging to any bond hereby secured, nor any claim for interest on any registered bond which in any way at or after maturity shall have been transferred or pledged separate and apart from the bond to which it relates, shall, unless accompanied by such bond, be entitled, in case of a default hereunder, to any benefit of or from this indenture, except after the prior payment in full of the principal of the bonds issued hereunder and of all coupons and interest obligations not so transferred or pledged.

SEC. 2. In case (1) default shall be made in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture, and any such default shall have continued for the period of six months, or in case (2) default shall be made in
292 the payment of the principal of any bond hereby secured, or in case (3) default shall be made in the payment of the principal of any of the bonds secured by the said indenture dated February 1, 1901, or (4) default shall be made in the due observance or performance of any other covenant or condition herein required to be kept or performed by the railroad company, and any such last-mentioned default shall have continued for the period of six months after writ-

notice thereof shall have been given to the railroad company by
e trustee or by the holders of five per cent in amount of the bonds
reby secured, then and in each and every such case the trustee,
rsonally, or by its agents or attorneys, may enter into and upon all
any part of the railways, rolling stock, property and premises,
nds, rights, interests, and franchises hereby conveyed or intended
to be, and each and every part thereof, and may exclude the rail-
ad company, its agents and servants, wholly therefrom; and having
d holding the same, may use, operate, manage, and control said
ilways and other premises, regulate the tolls for the transportation
passengers and freight thereon, and conduct the business thereof,
ther personally or by its superintendents, managers, receivers,
gents, and servants or attorneys, to the best advantage of the holders
the bonds hereby secured; and upon every such entry the trustee,
the expense of the trust estate, from time to time, either by pur-
ase, repairs, or construction, may maintain and restore, and may
sure or keep insured, the rolling stock, tools, and machinery and
ther property, buildings, bridges, and structures erected or pro-
ded for use in connection with said railways and other premises
hereof it shall have become possessed as aforesaid in the same man-
er and to the same extent as is usual with railway companies; and
kewise, from time to time, at the expense of the trust estate, may
ake all necessary or proper repairs, renewals, and replacements,
and useful alterations, additions, betterments, and improve-
93 ments thereto and thereon as to it may seem judicious; and in
such case the trustee shall have the right to manage the mort-
gaged premises and to carry on the business and exercise all rights
nd powers of the railroad company, either in the name of the rail-
oad company or otherwise, as the trustee shall deem best; and it
hall be entitled to collect and receive all tolls, earnings, income,
ents, issues, and profits of the same and every part thereof, and also
he income from stocks and bonds subject to this indenture; and after
deducting the expenses of operating said railways and other premises,
and of conducting the business thereof, and of all repairs, mainte-
nance, renewals, replacements, alterations, additions, betterments, and
improvements, and all payments which may be made for taxes, assess-
ments, insurance, and prior or other proper charges upon the said
premises and property, or any part thereof, as well as just and reason-
able compensation for its own services and for all agents, clerks,
servants, and other employees by it properly engaged and employed,
it shall apply the moneys arising as aforesaid as follows:

In case the principal of the bonds hereby secured shall not have be-
come due, to the payment of the interest in default, in the order of
the maturity of the installments of such interest, with interest on the
overdue installments at the rate of four per cent per annum; such
payments to be made ratably to the persons entitled thereto, without
discrimination or preference.

In case the principal of the bonds hereby secured shall have become
due, by declaration or otherwise, first to the payment of the accrued

interest (with interest on the overdue installments thereof at the rate of four per cent per annum) in the order of the maturity of the installments, and next to the payment of the principal of all bonds hereby secured; in every instance such payments to be made
294 ratably to the persons entitled to such payment without any discrimination or preference.

These provisions, however, are not intended in anywise to modify the provisions of section 1 of this article four, but are subject thereto.

SEC. 3. In case the trustee shall have entered, or shall have elected to enter, as aforesaid, or in case a receiver shall have entered into possession of the railroad hereby mortgaged and conveyed, or in case default shall be made and shall continue as specified in the preceding section 2 of this article, the trustee shall be entitled (subject to any prior rights of the trustee under the said first consolidated mortgage deed dated December 10, 1895, or of the trustee under the said indenture dated February 1, 1901, severally and respectively, in respect of the stocks and bonds pledged thereunder) to vote on all shares of stock then subject to this indenture, and for the benefit of the holders of the bonds hereby secured, shall be entitled to collect and receive all dividends on the shares of stock that shall then be subject to this indenture, and all sums payable for principal, interest, or otherwise upon any bonds or obligations that shall then be subject to this indenture, and to apply as hereinbefore provided the net moneys received; and, as holder of any such shares of stock and of any such bonds, to perform any and all acts, or to make or execute any and all transfers, requests, requisitions or other instruments, for the purpose of carrying out the provisions of this section; but in the event that a receiver of any railway upon which this indenture is a first lien shall have been appointed and shall be in possession thereof, the trustee from time to time, in its discretion may, and if requested by the holders of a majority in amount of the bonds hereby secured, it shall turn over any part or all of the interest moneys and dividends, so collected by it, to such receiver, and may cooperate with such receiver in managing and operat-
295 ing the entire system of the railroad company in such manner as the trustee shall deem for the best interests of the holders of the bonds hereby secured.

In aid of the powers in this section to it granted, the trustee hereunder, in case of and during any entry or receivership or default as herein contemplated, shall possess and may exercise, to the exclusion of the railroad company, any and all of the rights reserved to the railroad company under the said first consolidated mortgage deed of December 10, 1895, and the indenture of February 1, 1901, in respect of the stocks, bonds, or other obligations held by the trustee of either of said indentures, respectively, and subject to this indenture, including the right to demand and to receive from either of said trustees suitable proxies, orders, or other instruments to enable it or its nominee to vote and to collect dividends and interest upon any of such stocks, bonds, or other obligations.

SEC. 4. In case a default shall be made in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture, and any such default shall have continued for the period of six months, then and in every case of such continuing default, upon the written request of the holders of twenty-five per cent in amount of the bonds hereby secured then outstanding, the trustee, by notice in writing delivered to the railroad company, shall declare the principal of all bonds hereby secured and then outstanding to be due and payable immediately, and upon any such declaration the same shall become and be due and payable immediately, anything in this indenture or in said bonds to the contrary notwithstanding. This provision, however, is subject to the condition that if at any time after the principal of said bonds shall have been so declared due and payable, and before any sale of the mortgaged premises shall have been made, all arrears of interest upon all the bonds secured hereby, with interest at the rate of four per cent per annum on overdue installments of interest, shall either be paid by the railroad company or be col-
296 lected out of the mortgaged premises, and all defaults as aforesaid shall have been made good, then and in such case the holders of a majority in amount of the bonds hereby secured then outstanding, by written notice to the railroad company and to the trustee may waive such default and its consequences; but no such waiver shall extend to or affect any subsequent default or impair any right consequent thereon.

In case the trustee shall have proceeded to enforce any right under this indenture, by foreclosure, entry, or otherwise, and such proceedings shall have been discontinued or abandoned because of such waiver, or for any other reason, or shall have been determined adversely to the trustee, then and in every such case the railroad company and the trustee shall be restored to their former position and rights hereunder in respect of the mortgaged premises, and the shares of stock and the bonds and other property subject or to be subject to this indenture, and all rights, remedies, and powers of the trustee shall continue as though no such proceeding had been taken.

SEC. 5. In case (1) default shall be made in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture, and any such default shall have continued for the period of six months; or in case (2) default shall be made in the due and punctual payment of the principal of any bond hereby secured; or in case (3) default shall be made in the due observance or performance of any other covenant or condition herein required to be kept or performed by the railroad company, and any such last-mentioned default shall have continued for the period of six months after written notice thereof shall have been given to the railroad company by the trustee, or by the holders of five per cent in amount of the bonds hereby secured, then and in each and every such case of default the trustee, with or without entry, personally or by attorney, in its discretion, either

(a) may sell, subject to the liens thereon which then shall be
297 prior and superior to the lien of this indenture, to the highest and best bidder, all and singular the property and premises covered by this indenture, including bonds and stocks, rights, franchises, and interests, and appurtenances, and other real and personal property of every kind, and all right, title, and interest, claim, and demand therein, and right of redemption thereof, in one lot and as an entirety, unless a sale in parcels shall be required under the provisions of section 7 of this article four, in which case such sale shall be made in parcels, as in said section provided; which sale or sales shall be made at public auction at such place in the city of Elmira, in the State of New York, or at such other place and at such time and upon such terms as the trustee may fix and briefly specify in the notice of sale to be given as herein provided, or as may be required by law; or

(b) may proceed to protect and to enforce its rights and the rights of bondholders under this indenture by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for any foreclosure hereunder, or for the enforcement of any other appropriate legal or equitable remedy, as the trustee, being advised by counsel learned in the law, shall deem most effectual to protect and enforce any of its rights or duties hereunder.

SEC. 6. Upon the written request of the holders of twenty-five per cent in amount of the bonds hereby secured, in case of any continuing default as specified in section 5 of this article four, it shall be the duty of the trustee, upon being indemnified as hereinafter provided, to take all steps needful for the protection and enforcement of its rights and the rights of the holders of the bonds hereby secured, and to exercise the powers of entry or sale herein conferred, or both, or to take appropriate judicial proceedings by action, suit, or otherwise as the trustee, being advised by counsel learned in the law, shall
298 deem most expedient in the interest of the holders of the bonds hereby secured; but anything in this indenture to the contrary notwithstanding, the holders of seventy-five per cent in amount of the bonds hereby secured and then outstanding from time to time shall have the right to direct and to control the action of the trustee, and the method and the place of conducting any and all proceedings for any sale of the premises and property subject to this indenture, or for the foreclosure of this indenture, or for the appointment of a receiver, or any other proceedings hereunder.

SEC. 7. In the event of any sale, whether made under the power of sale herein granted or conferred, or under or by virtue of judicial proceedings, or of some judgment or decree of foreclosure and sale, the whole of the property subject to this indenture shall be sold in one parcel and as an entirety, including all the rights, title, estates, railroads, equipment, franchises, leases, leasehold interests, contracts, stocks, bonds, and other real and personal property of every name and nature, unless such sale as an entirety is impracticable by reason of some statute or other cause, or unless the holders of a majority

n amount of the bonds hereby secured then outstanding shall in writing request the trustee to cause said premises to be sold in parcels, n which case the sale shall be made in such parcels as may be specfied in such request; and this provision shall bind the parties hereto, nd each and every of the holders of the bonds and coupons hereby ecured or intended so to be.

SEC. 8. Notice of any such sale pursuant to any provision of this ndenture shall state the time and place when and where the same is o be made, and shall contain a brief general description of the property to be sold, and shall be sufficiently given if published once in each week for four successive weeks prior to such sale in a newspaper published in New York, N. Y., and in a newspaper published in Chicago, Illinois.

299 SEC. 9. The trustee may adjourn from time to time any sale by it to be made under the provisions of this indenture by announcement at the time and place appointed for such sale or for such adjourned sale or sales; and without further notice or publication, it may make such sale at the time and place to which the same shall be so adjourned.

SEC. 10. Upon the completion of any sale or sales under this indenture, the trustee shall execute and deliver to the accepted purchaser or purchasers a good and sufficient deed, or good and sufficient deeds, and other instruments, conveying, assigning and transferring the properties and franchises sold, subject severally and respectively to the liens thereon which then shall be prior and superior to the lien of this indenture. The trustee and its successors hereby are appointed the true and lawful attorneys irrevocable of the railroad company, in its name and stead to make all necessary conveyances and assignments of property and all necessary transfers of shares of stock or bonds or other obligations thus sold; and for that purpose it and they may execute all necessary deeds and instruments of assignment and transfer, and may substitute one or more persons with like power; the railroad company hereby ratifying and confirming all that its said attorneys or such substitute or substitutes shall lawfully do by virtue hereof.

Any such sale or sales made under or by virtue of this indenture, whether under the power of sale herein granted and conferred, or under or by virtue of judicial proceedings, shall operate to divest all right, title, interest, claim, and demand whatsoever, either at law or in equity, of the railroad company, of, in, and to the premises and property so sold, and shall be a perpetual bar both at law and in equity, against the railroad company, its successors and assigns, and against any and all persons claiming or to claim the premises or property sold, or any part thereof, from, through, or under the railroad company, its successors, or assigns.

The personal property and chattels conveyed or intended 300 to be conveyed by or pursuant to this indenture, other than stocks, bonds, and other securities and claims, shall be real estate for all the purposes of this indenture, and shall be held and

taken to be fixtures and appurtenances of the said railroads and part thereof, and are to be used and sold therewith and not separate therefrom, except as herein otherwise provided.

SEC. 11. The receipt of the trustee for the purchase money paid at any such sale shall be a sufficient discharge therefor to any purchaser of the property or any part thereof, sold as aforesaid; and no such purchaser or his representatives, grantees, or assigns, after paying such purchase money and receiving such receipt, shall be bound to see to the application of such purchase money upon or for any trust or purpose of this indenture, or in any manner whatsoever be answerable for any loss, misapplication, or nonapplication of any such purchase money or any part thereof, or be bound to inquire as to the authorization, necessity, expediency, or regularity of any such sale.

SEC. 12. In case of such sale under the foregoing provisions of this article, whether made under the power of sale herein granted or pursuant to judicial proceedings, or in case of a sale upon foreclosure of the said first consolidated mortgage deed dated December 10, 1895, or of the said indenture dated February 1, 1901, by reason of a default of the railroad company thereunder, the principal sums of the bonds hereby secured, if not previously due, shall immediately thereupon become due and payable, anything in said bonds or in this indenture to the contrary notwithstanding.

SEC. 13. The purchase money, proceeds, or avails of any such sale, whether under the power of sale herein granted or pursuant to judicial proceedings, together with any other sums which then
301 may be held by the trustee under any of the provisions of this indenture as part of the trust estate or the proceeds thereof shall be applied as follows:

First. To the payment of the costs and expenses of such sale, including a reasonable compensation to the trustee, its agents, attorneys, and counsel, and of all expenses, liabilities, and advances made or incurred by the trustee, and to the payment of all taxes, assessments, or liens prior to the lien of these presents, except the superior liens and any taxes, assessments, or other charges subject to which the property shall have been sold.

Second. To the payment of the whole amount then owing or unpaid upon the bonds hereby secured for principal and interest, with interest at the rate of four per cent per annum on the overdue installments of interest, and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the said bonds, then to the payment of such principal and interest, without preference or priority of principal over interest, or of interest over principal, or of any installment of interest over any other installment of interest, ratably, to the aggregate of such principal and the accrued and unpaid interest, subject, however, to the provisions of section 1 of this article four.

Third. To the payment of the surplus, if any, to the railroad company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same.

SEC. 14. Upon any such sale by the trustee or pursuant to judicial proceedings, any purchaser, for or in settlement or payment of the purchase price of the property purchased, shall be entitled to use and apply any bonds, and any matured and unpaid coupons hereby secured, by presenting such bonds and coupons in order that
302 there may be credited thereon the sums applicable to the payment thereof out of the net proceeds of such sale to the owner of such bonds and coupons, as his ratable share of such net proceeds, after the deduction of costs, expenses, compensations, and other charges; and thereupon such purchaser shall be credited, on account of such purchase price payable by him, with the portion of such net proceeds that shall be applicable to the payment of, and that shall have been credited upon, the bonds and coupons so presented; and, at any such sale, any bondholders may bid for and purchase, such property and may make payment therefor as aforesaid, and, upon compliance with the terms of sale, may hold, retain, and dispose of such property without further accountability.

SEC. 15. The railroad company covenants that (1) in case default shall be made in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture, and such default shall be made in the payment of the principal of any such bonds when the same shall become payable, whether upon the maturity of said bonds, or upon declaration as authorized by this indenture, or upon a sale as set forth in section 12 of this article four, then, upon demand of the trustee, the railroad company will pay to the trustee, for the benefit of the holders of the bonds and coupons hereby secured, then outstanding, the whole amount that then shall have become due and payable on all such bonds and coupons then outstanding, for interest or principal, or both, as the case may be, with interest at the rate of four per cent per annum upon the overdue principal and installments of interest; and in case the railroad company shall fail to pay the same forthwith upon such demand, the trustee, in its own name and as trustee of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.
303 The trustee shall be entitled to recover judgment as aforesaid, either before or after or during the pendency of any proceedings for the enforcement of the lien of this indenture, and the right of the trustee to recover such judgment shall not be affected by any entry or sale hereunder, or by the exercise of any other right, power, or remedy for the enforcement of the provisions of this indenture or the foreclosure of the lien thereof; and in case of a sale of the property subject to this indenture, and of the application of the proceeds of sale to the payment of the debt hereby secured, the trustee, in its own name and as trustee of an express trust, shall be entitled to enforce payment of and to receive all amounts then remaining due and unpaid upon any and all of the bonds issued hereunder and then outstanding, for the benefit of the holders thereof, and shall be entitled to recover judgment for any portion of the debt remaining unpaid, with interest. No recovery of any such judgment by

the trustee, and no levy of any execution upon any such judgment upon property subject to this indenture, or upon any other property, shall in any manner or to any extent affect the lien of this indenture upon the property or upon any part of the property subject to this indenture, or any rights, powers, or remedies of the trustee hereunder, or any lien, rights, powers, or remedies of the holders of the bonds hereby secured, but such lien, rights, powers, and remedies of the trustee and of the bondholders shall continue unimpaired as before.

Any moneys thus collected by the trustee under this section shall be applied by the trustee towards payment of the amounts then due and unpaid upon such bonds and coupons in respect of which such moneys shall have been collected, ratably and without any preference or priority of any kind (except as provided in section 1 of this article four), according to the amounts due and payable upon such bonds and coupons, respectively, at the date fixed by the trustee for the distribution of such moneys, upon presentation of the several
304 bonds and coupons, and stamping such payment thereon, if partly paid, and upon surrender thereof, if fully paid.

SEC. 16. The railroad company will not at any time insist upon or plead or in any manner whatever claim or take the benefit or advantage of any stay or extension law, now or at any time hereafter in force, nor will it claim, take, or insist upon any benefit or advantage from any law now or hereafter in force providing for the valuation or appraisement of the property or any part of the property subject to this indenture, prior to any sale or sales thereof to be made pursuant to any provisions herein contained, or to the decree, judgment, or order of any court of competent jurisdiction, nor after any such sale or sales will it claim or exercise any right under any statute enacted by any State, or otherwise, to redeem the property so sold or any part thereof, and it hereby expressly waives all benefit and advantage of any such law or laws, and it covenants that it will not hinder, delay, or impede the execution of any power herein granted and delegated to the trustee, but that it will suffer and permit the execution of every such power as though no such law or laws had been made or enacted.

SEC. 17. Upon filing a bill in equity, or upon commencement of any other judicial proceedings, to enforce any right of the trustee or of the bondholders under this indenture, the trustee shall be entitled to exercise the right of entry, and also any and all other rights and powers herein conferred and provided to be exercised by the trustee upon the occur'ence and continuance of default, as hereinafter provided; and, as matter of right, the trustee shall be entitled to the appointment of a receiver of the premises and property subject to this indenture, and of the earnings, income, revenue, rents, issues, or profits thereof, with such powers as the court making such appointment shall confer; but notwithstanding the appointment of any receiver, the trustee shall be entitled, as pledged, to continue to

305 retain possession and control of any stocks, bonds, cash, and other property pledged or to be pledged with the trustee hereunder.

SEC. 18. At any time hereafter before full payment of the bonds secured hereby, and whenever it shall deem expedient for the better protection or security of such bonds (although then there shall be no default entitling the trustee to exercise the rights and powers conferred by sections 2 and 3 of this article four), the railroad company, with the consent of the trustee, may surrender and may deliver to the trustee full possession of the whole or of any part of the property, premises, and interests hereby conveyed or assigned, or intended so to be, and may authorize the trustee to collect the dividends and interest on all shares of stock, bonds, and other obligations subject to this indenture, and to vote upon all such shares of stock for any period fixed or indefinite. In such event the trustee shall enter into and upon the premises and property so surrendered and delivered, and shall take and receive possession thereof, for such period, fixed or indefinite, as aforesaid, without prejudice, however, to its right at any time subsequently, when entitled thereto by any provision hereof, to insist upon maintaining and to maintain such possession though beyond the expiration of any such prescribed period, and the trustee, from the time of its entry upon such premises and property, shall work, maintain, use, manage, control, and employ the same in accordance with the provisions of this indenture, and shall receive and apply the income and revenues thereof as provided in section 2 of this article four. Upon application of the trustee, and with the consent of the railroad company, if then there be no subsisting default such as is specified in said section 2 of this article four, and without such consent if then there shall be such a subsisting default, a receiver may be appointed to take possession of, and to operate, maintain, and manage the whole or any part of the property subject to this
306 indenture, and the railroad company shall transfer and deliver to such receiver all such property, wheresoever the same may be situated; and in every case, when a receiver of the whole or of any part of said property shall be appointed under this section, or otherwise, the net income and profits of such property shall be paid over to, and shall be received by, the trustee, for the benefit of the holders of the bonds hereby secured; provided, however, that notwithstanding the appointment of any such receiver, the trustee, as pledgee, shall be entitled to retain possession and control of any stocks, bonds, cash, and other property pledged or to be pledged with the trustee hereunder.

SEC. 19. In case of any default hereunder, if, in order to preserve the franchises of the railroad company and to avoid foreclosure and sale involving the organization of a successor company, any plan of reorganization shall be proposed with provisions for the modification of this indenture, so far as to authorize and require the creation of new liens upon the property subject to this indenture, prior and superior to the lien hereof, then, and in every such case, registered

holders of four-fifths in amount of all of the bonds hereby secured then outstanding, by writing, may direct the trustee, in behalf of all the holders of all bonds then or thereafter issued hereunder, to acquiesce in the provisions of such plan, which plan also may determine and provide for the interests of other creditors and lienors and of the shareholders of the railroad company. This special power, however, is granted to the registered holders of four-fifths in amount of the bonds upon the express condition that no bond hereby secured and then outstanding shall be changed as to the amount of principal or the date of payment thereof, or as to the rate or dates of payment of interest, or as to the price or rate at which shares of common stock will be issued in conversion of any such bond according to the terms thereof, as herein contemplated. Thereupon, but not otherwise, the trustee shall, by writing, acquiesce in such provisions of such
307 plan, and such acquiescence by the trustee shall constitute the irrevocable assent of all holders of bonds and coupons hereby secured to any such accepted modifications, as set forth in such plan and necessary to give effect to such provisions thereof. All such modifications so affecting this indenture and the bonds and coupons hereby secured shall be reduced to a written agreement between the railroad company and the trustee, and such agreement shall be recorded in New York County, New York; Passaic County, New Jersey; Susquehanna County, Pennsylvania; Marion County, Ohio; Huntington County, Indiana, and Cook County, Illinois; and, thenceforth, shall be deemed to be part of this indenture, and thereafter the lien of this indenture, and of the bonds hereby secured, shall be deemed to be, and shall be, subordinate to such new and prior liens created pursuant to such plan, but only to the extent specified in such written agreement.

Registration for any purpose of this section shall be sufficient if then or theretofore made and then continuing in any manner permitted by section 3 of article two of this indenture.

SEC. 20. No holder of any bond or coupon hereby secured shall have any right to institute any suit, action, or proceeding in equity or at law for the foreclosure of this indenture, or for the execution of any trust hereunder, or for the appointment of a receiver, or for any other remedy hereunder, unless such holder previously shall have given to the trustee written notice of such default, and of the continuance thereof, as hereinbefore provided; nor unless, also, the holders of twenty-five per cent in amount of the bonds hereby secured, then outstanding, shall have made written request upon the trustee, and shall have afforded to it a reasonable opportunity either to proceed to exercise the powers hereinbefore granted or to institute such action, suit, or proceeding in its own name; nor unless, also, they shall have offered to the trustee adequate security and indemnity against
308 the costs, expenses, and liabilities to be incurred therein or thereby; and such notification, request, and offer of indemnity are hereby declared, in every such case, at the option of the trustee, to be conditions precedent to the execution of the powers and trusts

of this indenture for the benefit of the bondholders, and to any action or cause of action for foreclosure or for the appointment of a receiver or for any other remedy hereunder; it being understood and intended that no one or more holders of bonds and coupons shall have any right in any manner whatever by his or their action to affect, disturb, or prejudice the lien of this indenture, or to enforce any right hereunder except in the manner herein provided, and that all proceedings at law or in equity shall be instituted, had, and maintained in the manner herein provided and for the equal benefit of all holders of such outstanding bonds and coupons.

SEC. 21. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the trustee or to the holders of bonds hereby secured is intended to be exclusive of any other remedy or remedies, and each and every such remedy shall be cumulative, and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute.

SEC. 22. No delay or omission of the trustee or of any holder of bonds hereby secured to exercise any right or power accruing upon any default continuing as aforesaid, shall impair any such right or power, or shall be construed to be a waiver of any such default, or an acquiescence therein; and every power and remedy given by this article to the trustee or to the bondholders may be exercised from time to time and as often as may be deemed expedient by the trustee or by the bondholders.

309 ARTICLE FIVE.

No recourse under or upon any obligation, covenant, or agreement contained in this indenture, or in any bond or coupon hereby secured, or because of the creation of any indebtedness hereby secured, shall be had against any incorporator, stockholder, officer, or director of the railroad company, or of any successor corporation, either directly or through the railroad company, by the enforcement of any assessment or by any legal or equitable proceeding by virtue of any statute or otherwise; it being expressly agreed and understood that this indenture, and the obligations hereby secured, are solely corporate obligations, and that no personal liability whatever shall attach to, or be incurred by, the incorporators, stockholders, officers, or directors of the railroad company or of any successor corporation, or any of them, because of the incurring of the indebtedness hereby authorized, or under or by reason of any of the obligations, covenants, or agreements contained in this indenture, or in any of the bonds or coupons hereby secured, or implied therefrom; and that any and all personal liability of every name and nature, and any and all rights and claims against, every such stockholder, officer, or director, whether arising at common law or in equity, or created by statute or constiution, are hereby expressly released and waived as a condi-

tion of, and as part of the consideration for, the execution of this indenture and the issue of the bonds and interest obligations secured hereby.

ARTICLE SIX.

SECTION 1. Any demand, request, or other instrument, required by this indenture to be signed and executed by bondholders, may be in any number of concurrent writings of similar tenor, and may be signed or executed by such bondholders in person or by
310 agent appointed in writing. Proof of the execution of any such demand, request, or other instrument, or of the writing appointing any such agent, and of the ownership by any person of coupon bonds transferable by delivery, shall be sufficient for any purpose of this indenture, and shall be conclusive in favor of the trustee or of the railroad company with regard to due action taken by it under such instrument, if such proof be made in the following manner:

The fact and date of the execution by any person of any such demand, request, or other instrument or writing, may be proved by the certificate of any notary public, or other officer authorized to take acknowledgments of deeds to be recorded in New York, that the person signing such request or other instrument acknowledged to him the execution thereof, or by an affidavit of a witness to such execution.

The fact of the holding by any bondholder of coupon bonds transferable by delivery, and the amounts and issue numbers and serial letter of such bonds, and the date of his holding the same, may be proved by a certificate executed by any trust company, bank, bankers, or other depositary (wherever situated), if such certificate shall be deemed by the Trustee to be satisfactory, showing that at the date therein mentioned such person had on deposit with such depositary the bonds described in such certificate. The ownership of registered coupon bonds or of registered bonds without coupons shall be proved by the registers of such bonds.

SEC. 2. The railroad company and the trustee may deem and may treat the bearer of any coupon bond hereby secured, which shall not at the time be registered as hereinbefore authorized, and the bearer of any coupon for interest on any such bond, whether such bond shall be registered or not, as the absolute owner of such bond or coupon, as the case may be, for the purpose of converting the bond, or of receiving payment of any bond or coupon, and for all other purposes, and neither the railroad company nor the trustee shall be affected by any notice to the contrary.

311 The railroad company and the trustee may deem and treat the person in whose name any registered bond without coupons, issued hereunder, shall be registered upon the books of the railroad company as hereinbefore provided, as the absolute owner of such bond, for the purpose of converting the bond, or of receiving payment of, or on account of, the principal and interest of such bond, and for

other purposes, and may deem and treat the person in whose name
coupon bond shall be so registered as the absolute owner thereof,
the purpose of converting the bond, or of receiving payment of,
on account of, the principal thereof, and for all other purposes,
ept to receive payment of interest represented by outstanding
pons; and all such conversions or payments so made to any such
istered holder for the time being, or upon his order, shall be valid,
l effectual to satisfy and discharge the obligation to convert such
nds, and to the extent of the sum or sums so paid the liability for
neys payable upon any such bonds.

ARTICLE SEVEN.

SECTION 1. Upon the written request of the president or of a vice-
sident of the railroad company, approved of or authorized by
olution of its board of directors or executive committee, from time
time, while the railroad company is in possession of any of the
perty subject to this indenture, but subject to the conditions and
itations in this section prescribed, and not otherwise, the trustee
ll release from the lien and operation of this indenture any part
the railways, lands, and other property then subject thereto, except
cks, bonds, and other securities; provided (1) that no part of the
es of track or of the rights of way shall be released unless the use
reof no longer shall be necessary or advantageous in the operation
any of the lines of railway subject to this indenture, and no part
of such lines of track or rights of way shall so be released if
2 thereby the continuity of the lines of railway of the railroad
company shall be broken; and (2) that no part of the railways
other property subject to this indenture shall be released here-
der, unless at the time of such release it no longer shall be necessary
advantageous to retain the same for the operation, maintenance,
use of such lines of railway, or for use in the business of the rail-
ad company, and no such release shall be made unless the railroad
mpany shall have sold, or shall have contracted to exchange for
ner property or to sell, the property so to be released.

The proceeds of any and all such sales, and all moneys received as
mpensation for any property subject to this indenture taken by
ercise of the power of eminent domain (unless applied in accord-
ce with the requirements of the said indentures dated December 10,
95, and February 1, 1901, severally and respectively), shall be set
art and applied, with the approval of the trustee, to the purchase
other property, real or personal, or for betterments of or improve-
nts upon any part of the mortgaged premises. Any new property
quired by the railroad company to take the place of any property
leased hereunder, ipso facto, shall become and be subject to this
denture, as fully as if specifically mortgaged or assigned hereby,
t, if requested by the trustee, the railroad company will convey and
ign the same to the trustee by appropriate deeds or other instru-
nts upon the trusts and for the purposes of this indenture.

The railroad company, from time to time, while in possession of any of the property subject to this indenture, also shall have full power, in its discretion, to dispose of any portion of the machinery, equipment, and implements, at any time subject to the lien hereof, which may have become unfit for such use, replacing the same by new machinery, equipment, or implements, which shall become subject to this indenture.

313 In no event shall any purchaser or purchasers of any property sold or disposed of under any provision of this article be required to see to the application of the purchase money.

SEC. 2. Upon the written request of the president or of a vice-president of the railroad company, authorized or approved by resolution of the board of directors or of the executive committee of the railroad company, the trustee, from time to time, shall execute such releases or other instruments as may be required to release from the lien and operation of this indenture, the leasehold interest, or the term of the lessee or lessees and assigns, under any lease or sublease, which may be executed by the railroad company or by any lessor company of any land subject to this indenture or embraced in any lease pledged or assigned under this indenture, which is not embraced in the right of way of the mortgaged railroad or of any leased railroad and is not used for the purpose of stations, yards, roundhouses, freight houses, machine shops, docks, or gravel beds, or other purposes connected with the maintenance or operation of the railroad, and thereupon such leasehold interest or term shall be free from the lien and operation of this indenture. The reversion under any such lease shall be and shall remain subject to this indenture.

SEC. 3. In case any of the property subject to this indenture shall be in the possession of a receiver lawfully appointed, the powers in and by this article conferred upon the railroad company may be exercised by such receiver with the approval of the trustee; and if the trustee shall be in possession of any of such property under any provision of this indenture, then all the powers of this article conferred upon the railroad company may be exercised by the trustee in its discretion.

SEC. 4. The railroad company from time to time may make

314 changes or alterations in, or substitutions of, any leases, trackage rights, or contracts that are subject to this indenture; provided that in case of any changes or alterations in, or any substitutions of, any leases, contracts, or trackage rights, by which the railroad company now secures access to any point or points, the written consent of the trustee under the said first consolidated mortgage deed, dated December 10, 1895, shall first be obtained so far as concerns any such leases, contracts, or trackage rights subject to said indenture, and the written consent of the trustee hereunder shall first be obtained so far as concerns any such leases, contracts, or trackage rights, subject to this indenture and not subject to said first consolidated mortgage deed. In any such event, any modified, altered, or substituted leases, contracts, or trackage rights forthwith shall become bound by and be

ect to the terms of this indenture, in the same manner as those iously existing.

c. 5. A certificate signed by the president, or any vice-president, e chief engineer of the railroad company may be received by the ee as conclusive evidence of any of the facts mentioned in this le, and shall be full warrant to the trustee for its action on the thereof.

ARTICLE EIGHT.

CTION 1. The trustee shall not be answerable for the default or misconduct of any agent or attorney appointed in pursuance of, if such agent or attorney shall have been selected with reason- care; nor shall any trustee be responsible for the acts or defaults ny other trustee or trustees, or for anything whatever in connec- with this trust, except each for its or his willful misconduct or s negligence. The trustee shall be protected in acting upon notice, request, consent, certificate, bond, or other paper or docu- ment, believed by it to be genuine and to have been signed by the proper party. The trustee shall not be personally liable for any debts duly contracted by it, or for damages to persons or erty carried or injured, or for salaries or nonfulfillment of con- ts, during any period wherein the trustee shall manage the trust erty or premises upon entry or voluntary surrender as aforesaid. her shall the trustee be under any obligation to take any action rds the execution or enforcement of the trusts hereby created, h, in the opinion of the trustee, shall be likely to involve expense ability, unless one or more of the holders of the bonds hereby se- d shall, as often as required by the trustee, furnish reasonable mnity against such expense or liability; nor shall the trustee be ired to take notice of any default hereunder, unless notified in ing of such default by the holders of at least five per cent in unt of the bonds hereby secured then outstanding, or to take any on in respect of any default unless requested to take action in ect thereof by a writing signed by the holders of not less than nty-five per cent in amount of the bonds hereby secured, then out- ding, and tendered reasonable indemnity as aforesaid, anything in contained to the contrary notwithstanding; but the foregoing visions of this section are intended only for the protection of the tee, and shall not be construed to affect any discretion or power ny provision of this indenture given to the trustee, to determine ther or not it shall take action in respect of any default without notice or request from bondholders, or to affect any other de- on or power given to the trustee. The trustee shall not be respon- e for the recording of this indenture and shall not be required to the same as a chattel mortgage.

he trustee shall be reimbursed for, and be indemnified against, liability or damages which may be sustained by it in the premises. trustee shall have secured hereby upon the property covered this indenture, a lien prior to that of any bond issued under

316 this indenture, for its compensation and expenses, and also for any liability or damage by it sustained in the premises.

The trustee shall not be responsible in any manner whatsoever for for the validity hereof, or for the amount or the extent of the security afforded by the property covered hereby, or for the recitals herein or in said bonds contained, all such recitals being and to be taken as the statements of the railroad company; nor shall it be accountable for the use of any bonds certified and delivered by the trustee hereunder or for the application of the proceeds of such bonds.

The trustee shall be entitled to reasonable compensation for all services rendered by it in the execution of the trusts hereby created, and the railroad company agrees to pay such compensation as well as all expenses necessarily incurred or disbursed by the trustee hereunder.

SEC. 2. The trustee, or any trustee or trustees hereafter appointed, may resign and be discharged from the trusts created by this indenture by giving to the railroad company and to the bondholders notice by publication of such resignation, specifying a date when such resignation shall take effect, which notice shall be published at least once a day not less than thirty days nor more than sixty days prior to the date so specified, in a newspaper at that time published in New York, N. Y., and in a newspaper published in Chicago, Illinois. Such resignation shall take effect on the day specified in such notice, unless previously a successor trustee shall have been appointed as hereinafter provided, in which event such resignation shall take effect immediately upon the appointment of such successor or trustee.

Any trustee or trustees hereunder may be removed at any time by an instrument in writing under the hands of the holders of one-half in amount of the bonds hereby secured and then outstanding.

SEC. 3. In case at any time the trustee, or any successor
317 trustee, shall resign or shall be removed or otherwise shall become incapable of acting, a successor or successors may be appointed by the holders of a majority in amount of the bonds hereby secured then outstanding, by an instrument or concurrent instruments signed by such bondholders or their attorneys-in-fact duly authorized; but until a new trustee shall be appointed by the bondholders as herein authorized, the railroad company, by an instrument executed by order of its board of directors, may appoint a trustee to fill such vacancy; provided, however, that every such trustee shall be a trust company in the city of New York, having a capital and surplus aggregating at least $2,000,000, if there be such a trust company willing and able to accept the trust upon reasonable or customary terms. After any such appointment by the railroad company, it shall publish notice of such appointment once in each of four successive weeks in a newspaper published in New York, N. Y., and a newspaper published in Chicago, Illinois; and any new trustee so appointed by the railroad company shall immediately and without further act be superseded by a new trustee appointed in the manner above provided by the holders of a majority in amount of the bonds hereby secured,

if such appointment by such bondholders be made prior to the expiration of six months after such publication of notice.

Any successor trustee appointed hereunder shall execute, acknowledge, and deliver to the railrod company, an instrument accepting such appointment hereunder, and thereupon such successor trustee, without any further act, deed, or conveyance shall become vested with all the estates, properties, rights, powers, trusts, duties, and obligations of its predecessor in the trust hereunder, with like effect as if originally named as trustee herein; but nevertheless, on the written request of the railroad company or of the successor trustee, the trustee ceasing to act shall execute and deliver an instrument tranferring to such successor trustee, upon the trusts herein expressed, all the estates, properties, rights, powers, and trusts
318 of the trustee so ceasing to act, and shall duly assign, transfer, and deliver its interest in any stocks, bonds, or other property and moneys subject to this indenture to the successor trustee so appointed in its place; and, upon request of any such successor trustee, the railroad company shall make, execute, acknowledge, and deliver any and all deeds, conveyances, or other instruments in writing for more fully and certainly vesting in and confirming to such successor trustee all such estates, properties, rights, powers, and duties.

If at any time or times, in order to conform to any law of any State in which the railroad company may hold property, the railroad company shall so request, the railroad company and the trustee shall unite in the execution, delivery, and performance of all instruments and agreements necessary or proper to appoint another trust company or one or more persons approved by the trustee, to act either as cotrustee or as cotrustees, for any purpose of this indenture, of all or any of the property subject to this indenture jointly with the trustee originally named herein or its successors, or to act as separate trustee or trustees of any of such property.

Article nine.

Section 1. Until some default shall have been made in the due and punctual payment of the interest or of the principal of the bonds at any time outstanding and hereby secured, or of some part of such interest or principal, or in the due and punctual performance and observance of some covenant or condition hereof obligatory upon the railroad company, and, until such default shall have continued beyond the period of grace, if any, herein provided in respect thereof, or until the railroad company voluntarily shall have surrendered possession to the trustee as herein permitted, the railroad company, its successors or assigns, shall be suffered and permitted to retain actual posession of all the property subject to this indenture
319 other than bonds, certificates of stock, cash and other property pledged or to be pledged hereunder with the trustee), and to manage, operate, and use the same and every part thereof, with the rights and franchises appertaining thereto, and to collect,

receive, take, use, and enjoy the tolls, earnings, income, rents, issues, and profits thereof.

SEC. 2. If, when the bonds hereby secured shall have become due and payable, the railroad company shall well and truly pay, or cause to be paid, the whole amount of the principal and interest due upon all of the bonds and coupons hereby secured, then outstanding, or shall provide for the payment of such bonds and coupons by depositing with the trustee hereunder the entire amount due thereon for principal and interest, and also shall pay, or cause to be paid, all other sums payable hereunder by the railroad company, and shall well and truly keep and perform all the things herein required to be kept and performed by it according to the true intent and meaning of this indenture, then and in that case all property, rights and interests hereby conveyed or assigned or pledged shall revert to the railroad company, and the estate, rights, title and interest of the trustee shall thereupon cease, determine and become void; and the trustee in such case, on demand of the railroad company, and at its cost and expense, shall enter satisfaction of this indenture upon the record; otherwise the same shall be, continue and remain in full force and virtue.

ARTICLE TEN.

SECTION 1. All the covenants, stipulations, promises and agreements in this indenture contained, by or in behalf of the railroad company, shall bind its successors and assigns, whether so expressed or not.

SEC. 2. Nothing contained in this indenture or in any bond hereby secured, shall prevent any consolidation or merger of the rail-
320 road company with any other corporation, or any conveyance and transfer (subject to the continuing lien of this indenture and to all the provisions thereof), of all the property subject to this indenture as an entirety to a railroad corporation at that time existing under and by virtue of the laws of any State or States, and empowered to acquire the same; provided, however, that such consolidation, merger or sale shall not impair the lien and security of this indenture, or any of the rights or powers of the trustee or of the bondholders hereunder, and that upon such consolidation, merger or sale, the due and punctual payment of the principal and interest of all of the bonds hereby secured, according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this indenture, shall be assumed by the corporation formed by such consolidation or merger, or purchasing as aforesaid.

SEC. 3. In case, pursuant to section 2 of this article, the railroad company shall be consolidated or merged with any other corporation, or shall sell, convey and transfer (subject to this indenture), all the property covered by this indenture, as an entirety as aforesaid, the successor corporation formed by such consolidation, or into which the railroad company shall have been merged, or which shall have purchased and received a conveyance and transfer, as aforesaid—upon executing and causing to be recorded an instrument satisfactory to

the trustee, whereby such successor corporation shall assume the due and punctual payment of the principal and interest of the bonds hereby secured, and the performance of all the covenants and conditions of this indenture—shall succeed to, and be substituted for, the railroad company, party of the first part hereto, with the same effect as if it had been named herein as such party of the first part; and such successor corporation thereupon may cause to be signed, and may issue, either in its own name or in the name of the Erie Railroad Company, any or all of such bonds which theretofore shall not have been signed by the Erie Railroad Company and delivered to the trustee;
321 and, upon the order of said successor corporation, in lieu of the railroad company, and subject to all the terms, conditions and restrictions herein prescribed, the trustee shall certify and shall deliver any of such bonds which previously shall have been signed and delivered by the officers of the railroad company to the trustee for certification, and any of such bonds which such successor corporation thereafter shall cause to be signed and delivered to the trustee for that purpose. All the bonds so issued shall, in all respects, have the same legal rank and security as the bonds theretofore or thereafter issued in accordance with the terms of this indenture, as though all of said bonds had been issued at the date of the execution hereof.

SEC. 4. For every purpose of this indenture, including the execution, issue, and use of any and all bonds hereby secured, the terms "railroad company" and "Erie Railroad Company" include and mean not only the party of the first part hereto, but also any such successor corporation formed by consolidation or otherwise under the laws of New York or of any State or States. Every such successor or purchasing corporation shall possess, and from time to time may exercise, each and every right and power hereunder of the Erie Railroad Company in its name or otherwise.

SEC. 5. Any act or proceeding by any provision of this indenture authorized or required to be done or performed by any board or officer of the railroad company shall and may be done and performed with like force and effect by the like board or officer of any railroad corporation that shall at the time be such lawful sole successor or purchaser of the railroad company.

SEC. 6. Nevertheless, before the exercise of the powers conferred by this article, the railroad company, by instrument in writing executed by authority of two-thirds of its board of directors and delivered to the trustee, may surrender any of the powers reserved
322 to the railroad company or to such successor corporation, and thereupon such power so surrendered shall terminate.

The Standard Trust Company of New York, trustee, the party hereto of the second part, hereby accepts the trusts in this indenture declared and provided, and agrees to perform the same upon the terms and conditions hereinbefore set forth.

In order to facilitate the record of this indenture the same may be simultaneously executed in several counterparts, each of which when

so executed shall be deemed to be an original, and such counterparts shall together constitute but one and the same instrument.

The Erie Railroad Company hereby constitutes and appoints Frederick D. Underwood to be its attorney for it and in its name, and as and for its corporate act and deed, to acknowledge this mortgage deed before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment to the intent that the same may be duly recorded.

The Standard Trust Company of New York hereby constitutes and appoints William C. Lane to be its attorney for it and in its name, and as and for its corporate act and deed, to acknowledge this mortgage deed before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment to the intent that the same may be duly recorded.

In witness whereof the Erie Railroad Company, the party hereto of the first part, has caused this indenture to be signed and acknowledged or proved by its president, and its corporate seal to be hereunto affixed, and the same to be attested by the signature of its secretary; and The Standard Trust Company of New York, the party of the second part, has caused its corporate seal to be hereunto affixed and to be attested by its secretary, and these presents to be
323 signed and acknowledged or proved by its president, the day and year first above written.

[L. S.] ERIE RAILROAD COMPANY,
Per F. D. UNDERWOOD, *President.*

Attest:
G. A. RICHARDSON, *Secretary.*

By WM. C. LANE, *President.*

[L. S.] THE STANDARD TRUST COMPANY OF NEW YORK,

Attest:
WM. C. COX, *Secretary.*

Signed, sealed and delivered in the presence of—
As to Erie Railroad Company,
GEO. H. COREY,
GEORGE H. GARDINER.

Signed, sealed and delivered in the presence of—
As to The Standard Trust Company of New York—
GEO. H. COREY,
GEO. H. GARDINER.

STATE OF NEW YORK,
County of New York, City of New York, ss.:

Be it remembered, and I do certify, that on this 28th day of
324 May, in the year one thousand nine hundred and three, in said city and county aforesaid, before me, the undersigned, George H. Corey, a notary public in and for the county of New York, in the State of New York, and a commissioner of deeds in and for the State of New York, duly appointed and commissioned as such by the respective governors of and for the States of New Jersey, Ohio,

Indiana, Illinois, and the Commonwealth of Pennsylvania, being now duly qualified to act as such for each of said States and for said Commonwealth, personally appeared Frederick D. Underwood, the attorney named by the Erie Railroad Company in the foregoing mortgage deed, and Granville A. Richardson, whose names are signed to the foregoing and hereto annexed mortgage deed bearing date the 1st day of April, 1903, as president and secretary respectively of Erie Railroad Company, with whom I am personally acquainted, and who are personally well known to me to be, and who I am satisfied are, the president and attorney, and the secretary respectively, and to be the same persons whose names are subscribed to the foregoing instrument as such president and secretary respectively of Erie Railroad Company, the within-named grantor, and one of the corporations described in and which executed the said mortgage deed, in the said city and county of New York, for themselves and on behalf of said Erie Railroad Company, and being by me informed of the contents of said mortgage deed they, on this day severally acknowledged the due execution of the foregoing mortgage deed on the day the same bears date, and further acknowledged that they voluntarily executed, signed, sealed and delivered the said mortgage deed as their free and voluntary act and deed individually and as such president and secretary respectively, and as the free and voluntary act and deed of the said Erie Railroad Company, for the uses and purposes therein contained and set forth, and the said Frederick D. Underwood, by virtue and in pursuane of the authority therein conferred upon him, acknowledged the same to be the act of the said Erie Railroad Company; and the said Frederick D. Underwood and Granville A. Richardson, being by me first duly sworn according to law, did each for himself and neither for the other, on his oath, depose and say that they reside, the said Frederick D. Underwood in the city of New York, and the said Granville A. Richardson in the city of New York, both in the State of New York; that the said Frederick D. Underwood is the president and the said Granville A. Richardson is the secretary of the said Erie Railroad Company, one of the corporations described in and which executed the above instrument; that their names, respectively signed in attestation of the foregoing mortgage deed, are in the said deponents' own proper handwriting respectively; that they know the corporate seal of the said Erie Railroad
325 Company, the grantor in the foregoing mortgage deed named; that the seal affixed to the foregoing instrument is the common or corporate seal of the said Erie Railroad Company, and was thereto affixed by authority of the board of directors, and by order of said Erie Railroad Company, as the act and deed thereof; that they signed their names thereto, each in the presence of the other, by like authority, as president and secretary, respectively, of said company; and the said Granville A. Richardson did further depose and say that he was personally present and saw said Frederick D. Underwood as such president, sign the said mortgage deed and affix the common or corporate seal of the said Erie Railroad Company thereto, and heard

him declare that he signed, sealed, and delivered the same as the voluntary act and deed of the said Erie Railroad Company by order of the said board of directors, and that thereupon he, the said Granville A. Richardson, signed his name thereto at the same time as a subscribing witness.

In witness whereof, I have hereunto set my hand and my respective official seals the day and year first above written.

[L. S.] GEO. H. COREY,
Notary Public, County of New York.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of New Jersey.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Ohio.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Indiana.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Illinois.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the Commonwealth of Pennsylvania.

326 STATE OF NEW YORK,
County of New York, ss:

I, Thos. L. Hamilton, clerk of the county of New York, and also clerk of the Supreme Court for the said county, the same being a court of record, do hereby certify that George H. Corey, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof and acknowledgment a notary public in and for said county, duly commissioned and sworn, and authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances for land, tenements or hereditaments in said State of New York. And, further, that I am well acquainted with the handwriting of such notary public, and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county the 29th day of May, 1903.

[L. S.] THOS. L. HAMILTON, *Clerk.*

STATE OF NEW YORK,
County of New York, City of New York, ss:

Be it remembered, and I do certify, that on this 28th day of May, in the year one thousand nine hundred and three, in said city and county aforesaid, before me, the undersigned, George H. Corey, a notary public in and for the county of New York, in the State of New York, and a commissioner of deeds in and for the State of New York, duly appointed and commissioned as such by the respective governors of and for the States of New Jersey, Ohio, Indiana,

and Illinois and the Commonwealth of Pennsylvania, being now duly qualified to act as such for each of said States and for said Commonwealth, personally appeared William C. Lane, the attorney named by The Standard Trust Company of New York in the foregoing mortgage deed, and William C. Cox, whose names are signed to the foregoing and hereto annexed mortgage deed bearing date the first day of April, 1903, as president and secretary, respectively, of
The Standard Trust Company of New York, with whom I
327 am personally acquainted, and who are personally well known
to me to be, and who, I am satisfied, are the president and attorney, and the secretary, respectively, and to be the same persons whose names are subscribed to the foregoing instrument as such president and secretary, respectively, of The Standard Trust Company of New York, the within named grantee, and one of the corporations described in and which executed the said mortgage deed, in the said city and county of New York, for themselves, and on behalf of said The Standard Trust Company of New York, and being by me informed of the contents of said mortgage deed, they, on this day, severally acknowledged the due execution of the foregoing mortgage deed on the day the same bears date; and further acknowledged that they voluntarily executed, signed, sealed, and delivered the said mortgage deed as their free and voluntary act and deed, individually and as such president and secretary, respectively, and as the free and voluntary act and deed of said The Standard Trust Company of New York, for the uses and purposes therein contained and set forth, and the said William C. Lane, by virtue and in pursuance of the authority therein conferred upon him, acknowledged the same to be the act of the said The Standard Trust Company of New York, and the said William C. Lane and William C. Cox, being by me first duly sworn according to law, did each for himself and neither for the other, on his oath, depose and say that they reside, the said William C. Lane in the city of New York, and the said William C. Cox in the city of New York, both in the State of New York, and that the said William C. Lane is the president and the said William C. Cox is the secretary, of said The Standard Trust Company of New York, one of the corporations described in and which executed the above instrument; that their names respectively signed in attestation of the foregoing mortgage deed are in the said deponent's own proper handwriting respectively, that they know the corporate seal of said The Standard Trust Company of New York, the grantee in the foregoing mortgage deed named, that the seal affixed to the foregoing instrument is the common or corporate seal of said The Standard Trust Company of New York, and was thereto affixed by authority of the board of directors and by order of said The Standard Trust Company of New York as the act and deed thereof; that they signed their names thereto, each in the presence of the other, by like authority as president and secretary respectively of said company; and the said William C. Cox did

further depose and say that he was personally present and saw said William C. Lane as such president sign the said mortgage deed and affix the common or corporate seal of said The Standard Trust
328 Company of New York thereto, and heard him declare that he signed, sealed and delivered the same as the voluntary act and deed of said The Standard Trust Company of New York by order of the said board of directors, and that thereupon he, the said William C. Cox, signed his name thereto at the same time as a subscribing witness.

It witness whereof, I have hereunto set my hand and my respective official seals the day and year first above written.

[L. S.] GEO. H. COREY,
Notary Public, County of New York.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of New Jersey.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Indiana.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Illinois.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the Commonwealth of Pennsylvania.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Ohio.

STATE OF NEW YORK,
County of New York, ss:

I, Thos. L. Hamilton, clerk of the county of New York, and also clerk of the Supreme Court for the said county, the same being a court of record, do hereby certify that George H. Corey, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof and acknowledgment a notary public in and for said county, duly commissioned and sworn, and authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances for land, tenements or hereditaments in said State of New York. And, further, that I am well acquainted with the handwriting of such notary public, and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county the 29th day of May, 1903.

[L. S.] THOS. L. HAMILTON, *Clerk.*

329 NEW YORK.

Recorded in the office of the register of the county of New York on the 29th day of May, A. D. 1903, at 11 o'clock 07 a. m., in block

series (mortgages), section 1, Liber 88, p. 1, and indexed under blocks number 2, 36, 130, on the land map of the city of New York.
Witness my hand and official seal.
[L. S.] JOHN H. J. RONNER, *Register.*

Recorded in the office of the register of the county of New York on the 29th day of May, A. D. 1903, at 11 o'clock 07 a. m., in block series (mortgages), section 3, Liber 113, p. 1, and indexed under blocks number 663, on the land map of the city of New York.
Witness my hand and official seal.
[L. S.] JOHN H. J. RONNER, *Register.*

Recorded in the office of the register of the county of New York on the 29th day of May, A. D. 1903, at 11 o'clock 07 a. m., in block series (mortgages), section 4, Liber 135, p. 1, and indexed under block number 1108 on the land map of the city of New York.
Witness my hand and official seal.
[L. S.] JOHN H. J. RONNER, *Register.*

330 Recorded in the office of the clerk of the county of Allegany on the 9th day of June, 1903, in Liber 99 of mortgages, p. 183, at 2.30 p. m.
Witness my hand and official seal.
[L. S.] THOS. S. TEFFT,
Dep. Clerk of Allegany County.

Recorded in the office of the clerk of the county of Broome on the 6th day of June, 1903, in Liber 122 of mortgages, p. 373, at 10.45 a. m.
Witness my hand and official seal.
[L. S.] A. K. MAREAN,
Clerk of Broome County.

Recorded in the office of the clerk of the county of Cattaraugus, on the 4th day of June, 1903, in Liber 141 of mortgages, p. 307, at 8 o'clock and examined.
Witness my hand and official seal.
[L. S.] E. E. KELLEY,
Clerk of Cattaraugus County.

331 Recorded in the office of the clerk of the county of Chautauqua, on the 4th day of June, 1903, in Liber 255 of mortgages, p. 61, at 3.36 p. m.
Witness my hand and official seal.
[L. S.] E. J. MCCONNELL,
Dep. Clerk of Chautauqua County.

Recorded in the office of the clerk of the county of Chemung, on the 9th day of June, 1903, in Liber 116 of mortgages, p. 22—9 a. m.
Witness my hand and official seal.
[L. S.] EDWIN D. BURGESS,
Dep. Clerk of Chemung County.

Recorded in the office of the clerk of the county of Erie, on the 2nd day of June, 1903, in Liber 975 of mortgages, page 43, at 3.26 p. m.
Witness my hand and official seal.
[L. S.]
J. H. PRICE,
Clerk of Erie County.

332 Recorded in the office of the clerk of the county of Delaware on the 5th day of June, 1903, in Liber 87 of mortgages, p. 161, at 4.55 o'clock p. m.
Witness my hand and official seal.
[L. S.]
W. T. BLACK,
Clerk of Delaware County.

Recorded in the office of the clerk of the county of Genesee on the 4th day of June, 1903, in Liber 115 of mortgages, p. 1, 8 a. m.
Witness my hand and official seal.
[L. S.]
C. B. PIXLEY,
Clerk of Genesee County.

Recorded in the office of the clerk of the county of Livingston on the 3rd day of June, 1903, in Liber 126 of mortgages, p. 64, 11.05 a. m.
Witness my hand and official seal.
[L. S.]
H. B. CURTIS,
Clerk of Livingston County.

333 Recorded in the office of the clerk of the county of Monroe on the 3rd day of June, 1903, at 9.13 a. m. in Liber 469 of mortgages, p. 106.
Witness my hand and official seal.
[L. S.]
JAMES COCHRANE,
Deputy Clerk of Monroe County.

Recorded in the office of the clerk of the county of Niagara on the 5th day of June, 1903, in Liber 286 of mortgages, p. 438, at 9.30 a. m.
Witness my hand and official seal.
[L. S.]
HECTOR M. SLOCUM,
Clerk of Niagara County.

Recorded in the office of the clerk of the county of Orange on the 4th day of June, 1903, in Liber 404 of mortgages, p. 1, 1.50 p. m.
Witness my hand and official seal.
[L. S.]
W. G. TAGGART,
Clerk of Orange County.

334 Recorded in the office of the clerk of the county of Rockland on the 4th day of June, 1903, in Liber 166 of mortgages, p. 15, at 10 o'clock a. m.
Witness my hand and official seal.
[L. S.]
CYRUS M. CRUM,
Clerk of Rockland County.

Recorded in the office of the clerk of the county of Steuben on the 8th day of June, 1903, in Liber 156 of mortgages, p. 408 &c., 2.30 p. m.
Witness my hand and official seal.
[L. S.]
J. D. WHEELER,
Clerk of Steuben County.

Recorded in the office of the clerk of the county of Sullivan on the 5th day of June, 1903, in Liber 96 of mortgages, p. 462, at 8.40 a. m.
Witness my hand and official seal.
[L. S.]
G. F. CURREY,
Clerk of Sullivan County.

335 Recorded in the office of the clerk of the county of Tioga on the 8th day of June, 1903, in Liber 71 of mortgages, p. 258, at 9 o'clock a. m.
Witness my hand and official seal.
[L. S.]
F. W. RICHARDSON,
Clerk of Tioga County.

Recorded in the office of the clerk of the county of Wyoming on the 3rd day of June, 1903, in Liber 66 of mortgages, p. 395, at 2.40 p. m.
Witness my hand and official seal.
[L. S.]
E. M. JENNINGS,
Clerk of Wyoming County.

NEW JERSEY.

Recorded in the office of the clerk of the county of Bergen on the 3rd day of June, 1903, in Liber 151 of mortgages, p. 307, at 1 p. m.
Witness my hand and official seal.
[L. S.]
JOHN R. RANNEY,
Clerk of Bergen County.

336 Recorded in the office of the register of the county of Essex on the 2nd day of June, 1903, in Liber 417 of mortgages, p. 1, at 2.27 p. m.
Witness my hand and official seal.
[L. S.]
GEORGE E. DECAMP,
Register of Essex County.

Recorded in the office of the register of the county of Hudson on the 2nd day of June, 1903, in Liber 497 of mortgages, p. 197, &c., at 9.20 a. m.
Witness my hand and official seal.
[L. S.]
JAMES C. CLARK,
Register of Hudson County.

Recorded in the office of the clerk of the county of Passaic on the 3rd day of June, 1903, in Liber P–6 of mortgages, p. 436, &c., at 2.30 p. m.
Witness my hand and official seal.
[L. S.]
JNO. J. SLATER,
Clerk of Passaic County.

Received in the clerk's office of the county of Morris, New Jersey, on the second day of June, 1903, at 4.24 o'clock p. m. and recorded in Book Q–5 of mortgages for said county on pages 1, &c.

Witness my hand and official seal.

[L. S.] DANIEL S. VOORHEES,
Clerk of Morris County.

337 Recorded in the office of the secretary of the State of New Jersey on the 3rd day of June, 1903, in Liber L of corporations, p. 308.

Witness my hand and official seal.

[L. S.] S. D. DICKINSON,
Secretary of State.

PENNSYLVANIA.

Recorded in the office of the recorder of deeds of the county of Pike, on the third day of June, 1903, in Liber 14 of mortgages, p. 473, etc.

Witness my hand and official seal.

[L. S.] JOHN C. WESTBROOK, JR.,
Recorder of Pike County.

3.50 p. m.

Recorded in the office of the recorder of deeds of the county of Wayne, on the 4th day of June, 1903, in Liber 19 of mortgages, p. 531.

Witness my hand and official seal.

[L. S.] F. H. CRAGO,
Recorder of Wayne County.

338 11.30 a. m.

Recorded in the office of the recorder of deeds of the county of Susquehanna on the 5th day of June, 1903, in Liber 28 of mortgages, p. 183.

Witness my hand and official seal.

[L. S.] B. B. BUFFEN,
Recorder of Susquehanna County.

Recorded in the office of the recorder of deeds of the county of Lackawanna, on the 4th day of June, 1903, in Liber 139 of mortgages, p. 1.

Witness my hand and official seal.

[L. S.] EMIL BONN,
Recorder of Lackawanna County.

7.50 p. m.

Recorded in the office of the recorder of deeds of the county of McKean, on the 9th day of June, 1903, in Liber 59 of mortgages, p. 50, &c.

Witness my hand and official seal.

[L. S.] H. M. CHOATE,
Recorder of McKean County.

339 Recorded in the office of the recorder of deeds of the county of Elk on the 9th day of June, 1903, in Liber P of mortgages, p. 1.
Witness my hand and official seal.
[L. S.] A. M. ENT,
Recorder of Elk County.

Recorded in the office of the recorder of deeds of the county of Jefferson on the 9th day of June, 1903, in Liber Q of mortgages, p. 102.
Witness my hand and official seal.
[L. S.] GIL. C. REITZ,
Recorder of Jefferson County.

10.30 a. m.
Recorded in the office of the recorder of deeds of the county of Warren on the 10th day of June, 1903, in Liber 30 of mortgages, p. 50.
Witness my hand and official seal.
[L. S.] C. D. CRANDALL,
Recorder of Warren County.

340 Recorded in the office of the recorder of deeds of the county of Erie on the 5th day of June, 1903, in Liber 48 of mortgages, p. 1.
Witness my hand and official seal.
[L. S.] WM. C. KRAEMER,
Recorder of Deeds of Erie County.

Recorded in the office of the recorder of deeds of the county of Crawford on the 6th day of June, 1903, in mortgage Book 62, p. 265.
Witness my hand and official seal.
[L. S.] A. G. OSTER,
Recorder of Crawford County.

Recorded in the office of the recorder of deeds of the county of Venango on the 6th day of June, 1903, in Liber 97 of mortgages, p. 1.
Witness my hand and official seal.
[L. S.] D. K. BUCHANAN,
Recorder of Venango County.

Recorded in the office of the recorder of deeds of the county of Tioga on the eighth day of June, 1903, in Liber 36 of mortgages, p. 183.
Witness my hand and official seal.
[L. S.] CHARLES L. BABCOCK,
Recorder of Tioga County.

341 Recorded in the office of the recorder of deeds of the county of Mercer on the 8th day of June, 1903, in Liber 37 of mortgages, p. 280.
Witness my hand and official seal.
[L. S.] G. G. LAFFERTY,
Recorder of Mercer County.

Recorded in the office of the recorder of deeds of the county of Lawrence on the 8th day of June, 1903, in Liber 58 of mortgages, p. 1.
Witness my hand and official seal.
[L. S.] ALFRED C. HYDE,
Recorder of Lawrence County.

OHIO.

16673.

Received for record June 5, 1903, at 1 p. m.
Recorded in the office of the recorder of the county of trumbull on the 20th day of June, 1903, in volume 57 of mortgages, page 364 et seq.
Witness my hand and official seal.
[L. S.] C. N. KYLE,
Recorder of Trumbull County.

342 Received for record June 5, 1903, at 10 a. m.
Received in the office of the recorder of the county of Mahoning on the 12th day of June, 1903, in volume 67 of mortgages, page 305, &c.
Witness my hand and official seal.
[L. S.] W. H. MCGINNIS,
Recorder of Mahoning County.

3774.

Received for record June 11, 1903, at 1 p. m.
Recorded in the office of the recorder of the county of Columbiana on the 11th day of June, 1903, in volume 271 of mortgages, page 332, &c.
[L. S.] E. M. CROSSER,
Recorder of Columbiana County.

12113.

Received for record June 5, 1903, at 4.35 p m.
Recorded in the office of the recorder of the county of Portage on the 25th day of June, 1903, in volume 190 of mortgages, page 75 et seq.
Witness my hand and official seal.
[L. S.] THOMAS RICHARDS,
Recorder of Portage County.

343 19469.

Received for record June 4, 1903, at 10 a. m.
Recorded in the office of the recorder of the county of Geauga on the 13th day of June, 1903, in volume 118 of mortgages, page 36, etc.
Witness my hand and official seal.
[L. S.] F. E. FORD,
Recorder of Geauga County.

292585.

Received for record June 12, 1903, at 9.10 a. m.
Recorded in the office of the recorder of the county of Cuyahoga on the 29th day of June, 1903, in volume 883 mortgages, page 1 et seq.
[L. S.]
J. C. SIEGRIST,
Recorder of Cuyahoga County.

34838.

Received for record June 11, 1903, at 8 a. m.
Recorded in the office of the recorder of the county of Summit on the 25th day of June, 1903, in volume 283 of mortgages, page 459 et seq.
Witness my hand and official seal.
[L. S.]
W. ALLING,
Recorder of Summit County.

344 2729.

Received for record June 6, 1903, at 10 a. m.
Recorded in the office of the recorder of the county of Medina on the 25th day of June, 1903, in volume 38 of mortgages, page 42 et seq.
Witness my hand and official seal.
[L. S.]
FRED. BECK,
Recorder of Medina County.

Received for record June 6, 1903, at 2.45 p. m.
Recorded in the office of the recorder of the county of Wayne on the same day of June, 1903, in volume 135 of mortgages, page 228 et seq.
[L. S.]
LEWIS C. FRANKS,
Recorder of Wayne County.

482.

Received for record June 8, 1903, 7.30 a. m.
Recorded in the office of the recorder of the county of Ashland on the 22nd day of June, 1903, in volume 108 of mortgages, page 1 et seq.
Witness my hand and official seal.
[L. S.]
B. F. PAULLIN,
Recorder of Ashland County.

345 Received for record June 8, 1903, at 9.45 a. m.
Recorded in the office of the recorder of the county of Richland, on the 30th day of June, 1903, in volume 64 of mortgages, page 1 et seq.
Witness my hand and official seal.
[L. S.]
W. E. O'DONNELL,
Recorder of Richland County.

Received for record June 8, 1903, at 1.05 p. m.
Recorded in the office of the recorder of the county of Crawford, on the 30th day of June, 1903, in volume 54 of mortgages, page 354 et seq.
[L. S.]
H. S. Z. MATTHIAS,
Recorder of Crawford County.

Received for record June 8, 1903, at 4.38 p. m.
Recorded in the office of the recorder of the county of Morrow on the 30th day of June, 1903, in volume 30 of mortgages, page 438 et seq.
Witness my hand and official seal.
[L. S.]
G. J. YOUNG,
Recorder of Morrow County.

346 Received for record June 9, 1903, at 8.30 a. m.
Recorded in the office of the recorder of the county of Marion on the 30th day of June, 1903, in volume 60 of mortgages, page 150 et seq.
Witness my hand and official seal.
[L. S.]
A. W. BRYANT,
Recorder of Marion County.

Received for record June 9th, 1903, at 12.40 p. m.
Recorded in the office of the recorder of the county of Union on the 25th day of June, 1903, in volume 50 of mortgage, page 246 et seq.
[L. S.]
JOHN J. ANDREWS,
Recorder of Union County.

Received for record June 9th, 1903, at 4.30 p. m.
Recorded in the office of the recorder of the county of Champaign on the 30th day of June, 1903, in volume 53 of mortgages, page 1 et seq.
Witness my hand and official seal.
[L. S.]
J. S. MOSES,
Recorder of Champaign County.

347 No. 588.
Received for record June 10, 1903, at 8.10 a. m,
Recorded in the office of the recorder of the county of Clarke on the 30th day of June, 1903, in volume 110 of mortgages, page 297 et seq.
Witness my hand and official seal.
[L. S.]
J. W. ALLEN,
Recorder of Clarke County.

Received for record June 10, 1903, at 10.10 a. m.
Recorded in the office of the recorder of the County of Greene on the 30th day of June, 1903, in volume 60 of mortgages, page 147 et seq.
Witness my hand and official seal.
[L. S.]
M. A. BROADSTONE,
Recorder of Greene County.

Received for record June 10, 1903, at 1.05 p. m.

Recorded in the office of the recorder of the county of Montgomery on the 15th day of June, 1903, in volume 254 of mortgages, page 1 et seq.

Witness my hand and official seal.

[L. S.]

JOHN L. THEOBALD,
Recorder of Montgomery County.
By AL. STICKEL, *Deputy.*

353 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
ERIE RAILROAD COMPANY, DEFENDANT.
April session, 1908.
No. 87. In Equity.

It is stipulated and agreed between counsel in the above cause that its submission on bill and answer and any averment or admission in the pleading of either party contained shall in no wise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted, and shall be operative and take effect only with respect to the present suit and for the purposes thereof.

CHARLES J. BONAPARTE,
Attorney-General.
JOHN G. JOHNSON,
Atty. for Deft.
ROBERT W. DE FORREST,
Atty. for Deft.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 87. April session, 1908. Equity. U. S. v. Erie Railroad Company. Stipulation of counsel. Filed June 16, 1908. Henry B. Robb, clerk. L.

354 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
ERIE RAILROAD COMPANY, DEFENDANT.
April session, 1908.
No. 87. In Equity.

The complainant in this cause hereby joins issue with the defendant, the Erie Railroad Company, and will submit the cause, by permission of the court, on bill, answer, and the stipulation and agreement between counsel in said cause filed.

CHARLES J. BONAPARTE,
Attorney-General.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 87. Equity. April session, 1908. U. S. v. Erie Railroad Company. Replication. Filed, June 16, 1908. Henry B. Robb, clerk. L.

[NOTE.—Here follow opinions, which are omitted in printing this record by stipulation of counsel. The opinions will be found printed

in the record of the case of the United States ex rel. the Attorney-General of the United States, plaintiff in error, *vs.* the Delaware, Lackawanna & Western Railroad Company, No. 562, of October term, 1908. (Int'l U.S. v Lehigh Co., No 919 D.C. 1909.)

431 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
vs.
ERIE RAILROAD COMPANY. } April session, 1908. In Equity. No. 87.

Before DALLAS, C. J.

And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penna. No. 87. U. S. v. Erie Railroad Company. Decree dismissing bill. Filed, Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

432 No. 87. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
ERIE RAILROAD COMPANY, DEFENDANT.

Now comes the complainant, the United States of America, through Charles J. Bonaparte, Attorney-General of the United States, and makes and files, on behalf of said United States, its assignment of errors, upon which it will rely upon its appeal to the Supreme Court of the United States from the judgment and decree made and entered in this case by the circuit court of the United States for the eastern district of Pennsylvania, on the sixth day of October, in the year nineteen hundred and eight—that is to say:

1. That the Circuit Court erred in dismissing the bill of complaint in this case;

2. That the Circuit Court erred in refusing the injunction prayed in this case;

3. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities clause," was not a valid exercise by the Congress of its powers under the third

clause of the eighth section of article one of the Constitution of the United States;

4. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities
433 clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States in so far as it affects the transportation of property owned, acquired, manufactured, mined, or produced by the defendant prior to the enactment of the said so-called "commodities clause;"

5. That the Circuit Court erred in holding that the said so-called "commodities clause" is not a regulation of interstate commerce within the true meaning of the third clause of the eighth section of article one of the Constitution of the United States;

6. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, deprives the defendant of its property in violation of the fifth amendment of the Constitution;

7. That the Circuit Court erred in holding that the said so-called "commodities clause" constitutes a prohibition and not a regulation of interstate commerce and, as such, exceeds the constitutional powers of the Congress conferred by the third clause of the eighth section of article one of the Constitution of the United States;

8. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, is discriminative in its provisions, and, therefore, constitutionally invalid;

9. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, constitutes an attempt to deprive the defendant of the right to use and enjoy its private property, and, as such, is incompatible with free government and inconsistent with the constitutional prohibitions against taking private property for public use without just compensation and depriving any person of liberty or property without due process of law;

434 10. That the Circuit Court erred in sustaining the objections raised by the defendant's answer to the constitutional validity of the so-called "commodities clause," the legislation above mentioned, and in not overruling each and all of the said objections.

Wherefore the said complainant and petitioner prays that the said judgment and decree of the Circuit Court of the United States for the Eastern District of Pennsylvania be reversed.

CHARLES J. BONAPARTE,
Attorney-General.

J. WHITAKER THOMPSON,
United States Attorney.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 87. April session, 1908. In Equity. The United States of America vs. Erie Railroad

Company. Assignment of Errors. Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

435 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
ERIE RAILROAD COMPANY, DEFENDANT. } No. 87. April session, 1908. In Equity.

To the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

The United States of America, through Charles J. Bonaparte, Attorney-General of the United States, feeling itself aggrieved by the judgment and decree entered in the above-entitled case, on the sixth day of October, in the year nineteen hundred and eight, does hereby appeal from said judgment and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

Dated, October sixth, 1908.

436 (Endorsed:) U. S. C. C., E. D. of Penna. No. 87. April session, 1908. In Equity. United States of America v. Erie Railroad Company. Petition for appeal. The clerk will please file within petition for appeal, the assignment of errors herewith, and order of court allowing appeal when granted. Charles J. Bonaparte, Attorney-General. J. Whitaker Thompson, U. S. attorney. Filed, October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

437 No. 87. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
ERIE RAILROAD COMPANY, DEFENDANT.

Before DALLAS, C. J.

It is hereby ordered, that the appeal in the above-entitled case to the Supreme Court of the United States be, and is hereby, allowed as prayed.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penna. No. 87. April session, 1908. In Equity. United States of America vs. Erie Railroad Com-

pany. Order of court allowing appeal. Filed, October 6th, 1908. Henry B. Robb, clerk. By L., deputy clerk.

438 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Erie Railroad Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, within thirty days, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein United States of America is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable George M. Dallas, judge of the Circuit Court of the United States, this sixth day of October, in the year of our Lord one thousand nine hundred and eight.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

Service accepted.

JOHN G. JOHNSON,
Per JOS. BAYARD,
Attorney for Appellee.

439 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, Henry B. Robb, clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceeding in the case of United States of America vs. Erie Railroad Company, No. 87, April session, 1908, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this seventh day of October in the year of our Lord one thousand nine hundred and eight, and of the independence of the United States the one hundred and thirty-third.

[SEAL.]

HENRY B. ROBB,
Clerk of C. C.

(Indorsement on cover:) File No. 21362. E. Pennsylvania C. C. U. S. Term No. 566. The United States of America, appellant, vs. Erie Railroad Company. Filed October 10th, 1908. File No. 21362.

Additional docket entries.

1908, Oct. 7. Record transmitted to U. S. Supreme Court.

1910, Feb. 22. Mandate received from U. S. Supreme Court ordering that the decree of this court be, and the same is hereby, reversed, &c., and filed.

1910, Feb. 25. Argued sur motion for settlement of decree.

1910, Mar. 7. Decree reinstating cause filed. Decree denying motion of complainant to dismiss bill of complaint without prejudice filed. Decree dismissing bill filed.

1910, Apr. 29. Assignments of error filed. Petition for appeal filed. Order allowing appeal filed. Citation allowed and issued. Citation returned, "service accepted" and filed.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, greeting:

Whereas lately in the Circuit Court of the United States for the Eastern District of Pennsylvania, before you or some of you, in a cause between the United States of America, complainant, and Erie Railroad Company, defendant, wherein the decree of the said Circuit Court, entered in said cause on the 6th day of October, A. D. 1908, is in the following words, viz: "And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed," as by the inspection of the transcript of the record of said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to Congress, in such case made and provided, fully and at large appears;

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and eight, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings in conformity with the opinion of this court.

MAY 3, 1909.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of June, in the year of our Lord one thousand nine hundred and nine.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

(Endorsed:) 87. Apr. s., 1908. File No., 21362. Supreme Court of the United States. No. 566. October term, 1908. The United States of America vs. Erie Railroad Company. Mandate. Filed Feb. 22, 1910. Henry B. Robb, clerk; by L., deputy clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
v.
ERIE RAILROAD COMPANY. } April sessions, 1908. In equity, No. 87.

Before Gray, Buffington & Lanning, J. J.

Whereas in the above entitled cause the following decree was entered in this court on October 6, 1908: "And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed;" and

Whereas the said decree was taken to the Supreme Court of the United States by an appeal; and

Whereas on the 3d day of May, 1909, a decree was entered in said Supreme Court in the following words: "It is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed. And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings in conformity with the opinion of this court;" and

Whereas the mandate of that court issued on the 17th day of June, 1909, and has been called to the attention of this court;

Now, therefore, it is ordered that the decree of this court entered October 6, 1908, dismissing the bill herein, be set aside, and the cause be reinstated upon the docket of this court.

Dated March 7, 1910.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Indorsed:) No. 87. Apr. sess., 1908. In the Circuit Court of the United States, Eastern District of Pennsylvania. In equity. United States of America v. Erie Railroad Company. Decree reinstating cause.

In the Circuit Court of the United States for the Eastern District o Pennsylvania.

UNITED STATES OF AMERICA, v. ERIE RAILROAD COMPANY. } April sessions, 1908. In equity, No. 87.

Before Gray, Buffington & Lanning, J. J.

Whereas in the above-entitled cause the following decree wa entered in this court on October 6, 1908: "And now, this sixth da of October, one thousand nine hundred and eight, the above caus having come on to be heard upon bill and answer, it is ordered an decreed that the bill be dismissed;" and

Whereas the said decree was taken to the Supreme Court of th United States by an appeal; and

Whereas on the 3d day of May, 1909, a decree was entered in sai Supreme Court in the following words: "It is now here ordered adjudged, and decreed by this court that the decree of the sai Circuit Court in this cause be, and the same is hereby, reversed. An it is further ordered that this cause be, and the same is hereby, re manded to the said Circuit Court for further proceedings in con formity with the opinion of this court;" and

Whereas the mandate of that court, issued on the 17th day o June, 1909, and has been called to the attention of this court; and

Whereas, upon motion of the complainant, the cause was rein stated upon the docket of this court; and

Whereas said complainant then moved that said decree of dis missal entered October 6, 1908, be changed to read: "And now, th sixth day of October, nineteen hundred and eight, the above caus having come on to be heard upon bill and answer, it is ordered an decreed that the bill be dismissed without prejudice," and counse having been heard on said motion; and

Whereas it appears to the court upon the pleadings that the de fendant, Erie Railroad Company, is not transporting in interstat commerce from any State, Territory, or the District of Columbia, t any other State, Territory, or the District of Columbia, or to an foreign country, any coal which has been mined, manufactured, o produced by it, and which it owns in whole or in part at the time o transportation, except such coal as is necessary and intended for it use in the conduct of its business as a common carrier, and in th opinion of the court is not violating the "commodities clause" with in the meaning of the clause as construed by the Supreme Court;

Now, therefore, it is ordered that said motion be denied.

Dated March 7, 1910.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Indorsed:) No. 87. Apr. sess., 1908. In the Circuit Court of th United States, Eastern District of Pennsylvania. In equity. Unite

States of America v. Erie Railroad Company. Decree denying motion of complainant to dismiss bill of complaint without prejudice.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
v.
ERIE RAILROAD COMPANY.
April sessions, 1898. In equity, No. 87.

Before Gray, Buffington, & Lanning, J. J.

Whereas in the above-entitled cause the following decree was entered in this court on October 6, 1908: "And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed;" and

Whereas the said decree was taken to the Supreme Court of the United States by an appeal; and

Whereas on the 3d day of May, 1909, a decree was entered in said Supreme Court in the following words: "It is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed. And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings in conformity with the opinion of this court;" and

Whereas the mandate of this court, issued on the 17th day of June, 1909, and has been called to the attention of the court; and

Whereas, referring to the said opinion of the Supreme Court of the United States and in conformity thereto, it appears upon the pleadings in this cause that the defendant Erie Railroad Company is not transporting in interstate commerce from any State, Territory, or the District of Columbia to any State, Territory, or the District of Columbia, or to any foreign country, and coal which has been mined, manufactured, or produced by it, and which it owned in whole or in part at the time of transportation, except such coal as is necessary and intended for its use in the conduct of its business as a common carrier;

And whereas the Attorney-General of the United States has moved for the entry of a decree dismissing the bill without prejudice, and said motion has been opposed by the defendant and the court has denied the motion;

And whereas the Attorney-General has declared, his motion to dismiss without prejudice having been denied, that he intends to proceed no further in this court in this cause:

It is therefore on motion of counsel for the defendant ordered and decreed that the bill be, and the same is hereby, dismissed.

Dated March 7, 1910.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Indorsed:) No. 87. Apr. sess., 1908. In the Circuit Court of the United States, Eastern District of Pennsylvania. In equity. United States of America v. Erie Railroad Company. Decree dismissing bill.

Equity, 87.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Erie Railroad Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the city of Washington, D. C., within thirty days, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States for the Eastern District of Pennsylvania, wherein United States of America is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. M. Lanning, judge of the Circuit Court of the United States for the Eastern District of Pennsylvania, this 29th day of April in the year of our Lord nineteen hundred and ten (1910).

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

Service accepted.

JOHN G. JOHNSON,
Attorney for Appellee.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *vs.* ERIE RAILROAD COMPANY, DEFENDANT.	In equity. April sessions, 1908. No. 87.

To the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania.

The United States of America, through William S. Kenyon, assistant to the Attorney-General of the United States, feeling itself aggrieved by the judgment and decree entered in the above entitled cause on the seventh day of March, in the year nineteen hundred and ten, does hereby appeal from said judgment and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said judgment and decree was made, duly

authenticated, may be sent to the Supreme Court of the United States.

April 29th, 1910.

WILLIAM S. KENYON,
Assistant to the Attorney-General.
EDWIN P. GROSVENOR,
Special Assistant to the Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *vs.* ERIE RAILROAD COMPANY, DEFENDANT.	In equity. April sessions, 1908. No. 87.

Before Lanning, C. J.

It is hereby ordered that the appeal in the above-entitled case to the Supreme Court of the United States be, and is hereby, allowed as prayed.

W. M. LANNING, *Circuit Judge.*
BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA, PETITIONER, *vs.* ERIE RAILROAD COMPANY, DEFENDANT.	In equity. April sessions, 1908. No. 87.

Before Gray, Buffington, and Lanning, circuit judges.

Comes now the United States of America, by counsel, and in connection with its petition for appeal to the Supreme Court of the United States from the decree of the Circuit Court of the United States for the Eastern District of Pennsylvania, entered herein on the seventh day of March, 1910, dismissing absolutely the bill of complaint herein, makes and files the following assignment of errors.

I.

The complainant having filed a bill of complaint praying an injunction under the fifth paragraph of the first section of the act to regulate commerce as amended by the act approved June 29, 1906, commonly called the "Commodities clause," in which bill it was

stated in effect that the Erie Railroad Company was transporting certain coal in violation of the commodities clause, and such proceedings having been had in said Circuit Court that said bill was dismissed by the Circuit Court on the ground that said act of Congress was unconstitutional and void, and complainant having prosecuted an appeal to the United States Supreme Court, and that court having construed said act, and having held it to be constitutional as so construed, and having remanded the case to the court below for further proceedings in conformity with the opinion of the Supreme Court, and the complainant on the filing of the mandate in the court below, and on the reinstatement of the case in that court having moved that the court dismiss the complaint without prejudice, the Circuit Court erred in denying said motion of complainant.

II.

The complainant having filed a bill of complaint praying an injunction under the fifth paragraph of the first section of the act to regulate commerce as amended by the act approved June 29, 1906, commonly called the "Commodities clause," in which bill it was stated in effect that the Erie Railroad Company was transporting certain coal in violation of the commodities clause, and such proceedings having been had in said Circuit Court that said bill was dismissed by the Circuit Court on the ground that said act of Congress was unconstitutional and void, and complainant having prosecuted an appeal to the United States Supreme Court, and that court having construed said act, and having held it to be constitutional as so construed, and having remanded the case to the court below for further proceedings in conformity with the opinion of the Supreme Court, and the complainant on the filing of the mandate in the court below, and on the reinstatement of the case in that court, having moved that the court dismiss the complaint without prejudice, and the court having denied said motion to dismiss without prejudice, and the defendant then having moved the court to dismiss the bill of complaint absolutely, said Circuit Court erred in dismissing said bill of complaint absolutely.

III.

The Circuit Court erred in dismissing the bill of complaint absolutely, for that the proceedings herein were commenced with the object and purpose of settling the differences between the complainant and the defendant concerning the meaning of the commodities clause and the power of Congress to enact it as correctly interpreted, and on said appeal to the United States Supreme Court that court construed the commodities clause and held it to be constitutional as so construed, and remanded the case for further proceedings in conformity with its opinion, but as the bill of complaint herein did not state a cause of action within the construction placed upon the com-

dities clause by the Supreme Court by reason of the omission of tain allegations of fact setting up the relations existing between e defendant and certain coal companies, and accordingly the plead- g of complainant was defective, the said bill of complaint should ve been dismissed without prejudice, for said dismissal without ejudice would have enabled the complainant to file a new com- int in another action for the same cause of action, whereas the solute dismissal of the bill by the Circuit Court constitutes a bar any further litigation of the same subject between the complainant d the defendant, and accordingly said Circuit Court erred in smissing the bill of complaint absolutely.

By reason whereof the United States prays that the said decree smissing the bill of complaint absolutely herein be reversed.

April 29th, 1910.

WILLIAM S. KENYON,
Assistant to the Attorney-General.
EDWIN P. GROSVENOR,
Special Assistant to the Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

Filed April 29, 1910.

HENRY B. ROBB, *Clerk.*

NITED STATES OF AMERICA, *Eastern District of Pennsylvania, sct:*

I, Henry B. Robb, clerk of the Circuit Court of the United States America for the Eastern District of Pennsylvania, in the Third ircuit, do hereby certify the foregoing to be a true and faithful copy the original pleas and proceedings in the case of the United States America against the Erie Railroad Company, #87, April session, 08, on file and now remaining among the records of the said court my office.

In testimony whereof, I have hereunto subscribed my name and fixed the seal of the said court at Philadelphia, this twenty-ninth ay of April, in the year of our Lord one thousand nine hundred nd ten, and of the Independence of the United States the one undred and thirty-fourth.

[SEAL.] HENRY B. ROBB, *Clerk of C. C.*

(Indorsement on cover:) File No., 22146. E. Pennsylvania. C. C. . S. Term No., 920. The United States of America, appellant, vs. rie Railroad Company. Filed May 7th, 1910. File No., 22146.

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209

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 921.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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1 APRIL SESSION, 1908.

Charles J. Bonaparte.
89
Robert W. de Forrest,
John G. Johnson.

United States of America
vs.
The Central Railroad Company of New Jersey.

1908, June 5. Bill of complaint filed.
1908, June 5. Subpœna issued returnable the first Monday of July next.
1908, June 5. Order for the appearance of Robert W. de Forrest and John G. Johnson, esquires, for defendant, filed.
1908, June 12. Answer filed.
1908, June 15. Printed copy of bill of complaint filed.
1908, June 16. Stipulation of counsel filed.
1908, June 16. Replication filed.
1908, June 16. Argued.
1908, June 17. Ordered that defendant file brief by June 25, 1908, and that complainant file reply brief by July 1, 1908.
1908, September 10. Opinion dismissing bill in equity filed.
1908, October 6. Dissenting opinion by Buffington, J., filed.
Decree dismissing bill of complaint filed.
Assignments of error filed.
Petition for appeal filed.
Order allowing appeal filed.
Citation allowed and issued.
Citation returned "service accepted" and filed.

2 No. 89. April sessions, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE CENTRAL RAILROAD COMPANY OF New Jersey, defendant.

Bill of complaint.

Filed Jun' 5, 1908. Henry B. Robb, clerk. By L., deputy clerk.

4 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE CENTRAL RAILROAD COMPANY OF New Jersey, defendant.

April sessions, 1908. No. 89. In Equity.

To the Honorable the Judges of said Court:

The United States of America, by Charles J. Bonaparte, its Attorney-General, brings this, its bill of complaint, against The Central

Railroad Company of New Jersey, a railroad company hereinafter more particularly described. And therefore your orator complains and says:

(1) That the said "The Central Railroad Company of New Jersey," herein designated and called "the defendant," is a corporation created, organized, and existing under the laws of the State of New Jersey, having its principal office in that State, at Jersey City, and also an office in the State of Pennsylvania, at the city of Philadelphia, and has been such corporation since long before the first day of May, in the year nineteen hundred and eight.

(2) That the defendant is, and has been during its corporate existence, a railroad company now, and for some time past, operating, with its branches and connections, a railroad whose lines extend through parts of the States of New Jersey, Pennsylvania, New York, and other States. That it is, and has been since long before the said first day of May, in the year nineteen hundred and eight, a common carrier within the meaning of an act of the Congress of the United States, approved February 4, 1887, entitled "An act to regulate commerce," and of all acts supplementary thereto or amendatory thereof; and that, as such common carrier, it is, and has been through all the period aforesaid, engaged in interstate transportation, particularly in the transportation, in interstate commerce, of the article or commodity known as "anthracite coal" from the mines and the mining lands in the State of Pennsylvania to the markets of other States.

(3) That the defendant is, and has been continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of a large majority of the capital stock of the Lehigh and Wilkes-Barre Coal Company, a corporation of the said State of Pennsylvania, and that it thus controls, and has been controlling, the election of the directors or managers of said coal company. That said coal company holds, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Carbon, Lehigh, Luzerne, and Wyoming, in the said State of Pennsylvania; but said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the direct management of the president and the secretary and treasurer of said coal company, who are, and for a long time past have been, the president and the secretary and treasurer, respectively, of the defendant, with the assistance and cooperation of the directors of the said coal company, a majority of whom are, and for a long time past have been, also directors of the defendant.

(4) That, by virtue of the ownership of a large majority of the capital stock of said coal company by the defendant, as hereinbefore stated, the defendant practically owns said coal lands and coal mines and the anthracite coal therein or thereupon and mined and being mined therefrom, and is also owner thereof in part, and likewise

has an interest therein; and that, by virtue of the management of said coal company by the president and other officers and directors of the defendant, as hereinbefore stated, the operations of said coal company in the mining of anthracite coal have been and are now being carried on by and under the authority of the defendant.

7 (5) That, moreover, the defendant is at the present time, and has been for a period since long before the said first day of May, in the year nineteen hundred and eight, the owner of some part of the capital stock of the Temple Iron Company, a corporation of the said State of Pennsylvania, which holds, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the said counties of Carbon, Lehigh, Luzerne, and Wyoming, which said coal lands and coal mines are being operated, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, in the mining of anthracite coal, by and under the direct management of the president of said last-mentioned coal company, who is and for a long time past has been the president of the defendant and of the directors of said last mentioned coal company, a majority of whom are and for a long time past have been also directors of the defendant. That, by virtue of such stock ownership the defendant owns in part and has an interest in said last-mentioned coal lands and coal mines and the anthracite coal therein or thereupon and mined and being mined therefrom; and that, by virtue of the management of said last-mentioned coal company by the president and other officers and directors of the defendant, as hereinbefore stated, the operations of sad last-mentioned coal company in the mining of anthracite coal are being car-

8 ried on, as they have been in the past, by and under the authority of the defendant.

(6) That from time to time since the first day of May, in the year nineteen hundred and eight, and at the present time, of the anthracite coal so mined, and being mined, as aforesaid, there has been, and there is being, loaded at, or near, the mines and lands from which said coal has been, and is being, mined, as aforesaid, and within said counties of Carbon, Lehigh, Luzerne, and Wyoming, upon the cars of the defendant, for transportation in interstate commerce, a large quantity, the number of tons whereof being to your orator unknown; that such large quantity of coal, when so loaded as aforesaid, has been, and is being, carried and transported in the cars aforesaid, over and upon the said railroad, and its said branches and connections, of the defendant, and through and over territory of the said State of Pennsylvania within the jurisdiction of this court, and from the said State of Pennsylvania, by continuous carriage, in interstate commerce, across the boundary line of the said State of Pennsylvania to and into the States of New York, New Jersey, and other States for sale and delivery at the markets of the said States of New Jersey, New York, and other States; and that such large quantity of anthracite coal, so transported as aforesaid, was not, and is not, necessary and intended

for the use of the defendant in the conduct of its business as a common carrier.

9 (7) That, the defendant being the owner, and part owner, of the anthracite coal mined, and being mined, and transported, and being transported, as aforesaid, and such coal having been, and being, mined by the defendant, and under its authority, as aforesaid, and the defendant having an interest in said coal as aforesaid, the transportation of said coal as aforesaid was, has been, and is, unlawful, being a failure to comply with, and a violation of, the fifth paragraph of the first section of said "Act to regulate commerce" as said section was amended by an act of the Congress of the United States, approved June 29, 1906, which prescribes:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

(8) That not only is said anthracite coal now being mined by and under the authority of the defendant and loaded on the cars of the defendant for transportation in interstate commerce, as hereinbefore set forth, but it will be so mined and loaded in the

10 future; and that it is the purpose of the defendant to continue the same unlawful transportation of said coal, so to be mined and loaded upon the cars of the defendant as aforesaid, as has been hereinbefore described, in violation of the law hereinbefore quoted.

(9) And so your orator says that the anthracite coal so as aforesaid being unlawfully transported by the defendant in interstate commerce, and the anthracite coal which it is the purpose of the defendant to continue to so unlawfully transport as aforesaid, in violation of the law hereinbefore quoted, is, and will be, "an article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority," and, also, such "article or commodity" owned by it "in whole, or in part," and is, likewise, "an article or commodity, other than timber and the manufactured products thereof," in which it has, and will have, an "interest direct or indirect;" and is not "an article or commodity" "necessary and intended," or which will be necessary and intended, "for its use in the conduct of its business as a common carrier."

To the end, therefore, that your orator may have that relief which it can only obtain in a court of equity; that the said defendant, "The Central Railroad Company of New Jersey," may make full answer under oath to all the allegations herein; and that an injunction

11 be granted to enjoin and prohibit the said "The Central Railroad Company of New Jersey" from further transporting, in

interstate commerce, the anthracite coal which it is the purpose of the defendant to transport, as hereinbefore stated, in violation of the law hereinbefore quoted, and that your orator may have such further or other relief in the premises as the nature and circumstances of the case may require.

May it please your honors to grant to your orator a writ of subpœna, to be directed to the said "The Central Railroad Company of New Jersey," thereby commanding it, at a certain time therein to be limited, personally to appear before this honorable court and then and there full, true, direct, and perfect answer make to all and singular the premises, and to perform and abide by such order, direction, and decree as may be made against it in the premises, and as shall seem meet and agreeable to equity.

And your orator will ever pray.

CHARLES J. BONAPARTE,
Attorney-General.

14 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA *vs.* CENTRAL RAILROAD COMPANY OF NEW JERSEY.	April session, 1908. No. 89.

Enter our appearance for defendant in the above case June 5th, 1908.

ROBERT W. DE FORREST,
JOHN G. JOHNSON,
Per F. MARKO RIVINUS,
Attorneys for Defendant.

To CLERK OF SAID COURT.

(Endorsed:) U. S. C. C. C., E. D. of Penna. No. 89. April session, 1908. U. S. of America v. Central Railroad Co. of New Jersey. Order for appearance. Filed Jun' 5, 1908. Henry B. Robb, clerk. By L., deputy clerk. Robert W. de Forrest, John G. Johnson, attorneys for defendant.

15 No. 89. April sessions, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA, COMPLAINANT, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, defendant.	In Equity.

Answer of Defendant, The Central Railroad Company of New Jersey.

JACKSON E. REYNOLDS, *Solicitor.*

ROBERT W. DE FOREST, *Counsel.*

Filed Jun' 12, 1908. Henry B. Robb, clerk. By L., deputy clerk.

17 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA, COMPLAINANT, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant.	April sessions, 1908. No. 89. Bill in Equity.

Answer of the Central Railroad Company of New Jersey.

The Central Railroad Company of New Jersey, the defendant in the above bill of complaint, expressly saving and reserving to itself all benefit and advantage of exception to the manifold errors, uncertainties, and insufficiencies in said bill of complaint contained, for answer thereto, or to such parts thereof as it is advised it is material and necessary to answer, says:

(1) This defendant admits the averments of paragraph 1 of
18 the bill, and further states that it was incorporated by and duly organized under an act of the State of New Jersey entitled "An act to incorporate the Somerville and Easton Railroad Company," approved April 26, 1847, and the supplement to said act, approved February 22, 1849, whereby, inter alia, the corporate name of the said company was changed to "The Central Railroad Company of New Jersey."

This defendant avers that it is duly possessed of and may lawfully exercise all and every the corporate rights, powers, privileges, and franchises mentioned in and conferred by the said acts and by divers other acts supplementary to and amendatory thereof subsequently from time to time enacted, to all of which it prays leave to refer at the hearing of this cause, with the same force and effect as if the same were herein set out at length.

In addition to the powers conferred in and by the aforementioned acts, this defendant avers that it has been and is possessed of all the powers, privileges, and rights conferred by section 51 of the general corporation law of New Jersey, which reads as follows:

"Any corporation may purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of the shares of the capital stock of, or any bonds, securities, or evidences of indebtedness created by, any other corporation or corporations of this or any other State, and while the owner of such stock may exercise all rights, powers, and privileges of ownership, including the right to vote thereon;"

and by two general statutes of the State of Pennsylvania entitled,
19 respectively, "An act to authorize incorporated companies to invest and reinvest surplus funds in mortgages, stocks, and other securities, and fixing the time for holding elections for directors," approved March 31, 1868, and "An act to authorize railroad and canal companies to aid in the development of coal, iron, lumber, and other material interests of this Commonwealth," approved April 15, 1869, to each of which acts it prays leave to refer at

the hearing of this cause with the same force and effect as if the same were herein set forth at length.

(2) This defendant admits the averments of paragraph 2 of the bill, that it has been during its corporate existence a railroad company and for some time past operating, with its branches and connections, a railroad extending through parts of the States of New Jersey and Pennsylvania to New York, and by its connections to other States; that it is and has been since long before the first day of May, 1908, a common carrier within the meaning of the act of Congress of the United States approved February 4, 1887, entitled "An act to regulate commerce," and of all acts supplementary thereto or amendatory thereof; and that as such common carrier it is and has been for all the period aforesaid engaged in interstate transportation, particularly in the transportation in interstate commerce of the article or commodity known as anthracite coal from the mines and mining lands of the State of Pennsylvania to the markets of other States.

(3) This defendant admits, as alleged in paragraph 3 of the bill of complaint, that it is and has been continuously since long before the first day of May, 1908, the owner of a large majority of the capital stock of the Lehigh and Wilkes-Barre Coal Company, a corporation of the State of Pennsylvania, and states that the said Lehigh and Wilkes-Barre Coal Company is a corporation organized in January, 1874, by the consolidation and merger under the general statutes of the State of Pennsylvania of the Honey Brook Coal Company and the Wilkes-Barre Coal and Iron Company, corporations organized, respectively, by an act of the legislature of the State of Pennsylvania, entitled "An act to incorporate the Honey Brook Coal Company," approved April 23, 1864, and by an act of the legislature of the State of Pennsylvania, entitled "An act to incorporate the Wilkes-Barre Coal and Iron Company," approved June 8, 1864, and by the acts supplementary thereto and amendatory thereof. To all of said acts it prays leave to refer at the hearing of this cause with the same force and effect as if the same were herein set out at length.

Previous to the year 1874, when these two last-named companies were merged and consolidated into the present Lehigh and Wilkes-Barre Coal Company, this defendant owned, and for several preceding years had owned, a majority of the stock of each of the said Honey Brook Coal Company and Wilkes-Barre Coal and Iron Company. All of the said coal companies were authorized to acquire by purchase or lease coal lands in the State of Pennsylvania, and have acquired such lands, said Honey Brook and Wilkes-Barre Coal and Iron companies prior to their merger and consolidation as aforesaid, and the Lehigh and Wilkes-Barre Coal Company since.

This defendant further states and avers that it became the lawful owner of the shares of each of the said coal companies, as hereinabove stated, many years prior to the enactment of the act of Congress entitled "An act to amend an act to regulate commerce, approved February 1st, 1887, and all acts amendatory thereof, and to

enlarge the powers of the Interstate Commerce Commission," approved June 29th, 1906.

This defendant further admits that it is, as stated in paragraph 5 of the bill of complaint, and has been for a period long prior to the first day of May, 1908, the owner of some part, viz, a minority part, of the capital stock of the Temple Iron Company, a corporation of the State of Pennsylvania.

This defendant further admits, as alleged in paragraphs 3, 4, and 5 of the bill of complaint, that each of the above-mentioned coal companies holds under conveyances and leases made long prior to the said first day of May, 1908, its anthracite coal lands situate in what is known as the "Anthracite coal regions" of Pennsylvania, and that said companies have been from a date long prior to the said first day of May, 1908, engaged in mining anthracite coal thereon and therefrom, such mining operations being carried on under the immediate and direct control of the executive officers of the respective companies, these, in turn, being subject to the power and control vested in the boards of directors of the said companies by their respective charters.

And this defendant also admits that at the present time and for many years past the president and the secretary and treasurer of the Lehigh and Wilkes-Barre Coal Company are and have been the same persons who at the same time were president, secretary, and treasurer of this defendant, and that a majority of the board of directors of the said Lehigh and Wilkes-Barre Coal Company are and have been also directors of this defendant; and this defendant also admits that as respects the Temple Iron Company the same person who is and for several years past has been president of said Temple
22 Iron Company is also president of this defendant, and that a minority of the directors of the Temple Iron Company are also directors of this defendant.

This defendant denies that because or by virtue of its ownership of the aforesaid shares of stock of the said coal companies it has become the owner of the coal lands and coal mines, title to which is in the said companies, respectively, or of the coal therein or mined therefrom, or that it has any interest in said lands, mines, or coal; or that by virtue of its ownership of the shares of stocks of the said coal companies and the voting power incident thereto in the election of the managers or directors of each of said companies and such other officers as under the charter of each company are elected by the stockholders, the operations of said coal companies, or any of them, in the mining of anthracite coal are being carried on by and under the authority of this defendant.

(4) This defendant admits that from time to time since the first day of May, 1908, and at the present time anthracite coals produced from mines of the several coal companies heretofore mentioned—a portion whereof is sold before and a portion after the transportation thereof begins—have been transported and are still being transported at lawfully established schedule rates on and over its lines of railroad,

and that a considerable portion—approximately seventy-five per centum (75%) of the coal so mined—is carried to different destinations outside the State of Pennsylvania, the greater part of which is carried to the ports of New Jersey and New York, and that the transportation of such portion thereof by this defendant constitutes commerce between different States, and it also admits that the
23 coal thus transported was not, and is not, necessary nor intended for the use of the defendant in the conduct of its business as a common carrier.

(5) This defendant denies the correctness of the conclusions of law stated in paragraph 6 of the bill. Under advice of counsel, it denies that it results from its ownership of the shares of stock of the aforesaid coal companies, that the anthracite coals mined or produced from the mines of said coal companies have been or are being mined or produced by it or under its authority, or that it has any interest, direct or indirect, therein, within the purview, meaning, and intent of the clause of the act of Congress approved June 29, 1906, which is set out in paragraph 6 of the bill, but on the contrary, it states and avers that it has, and can have no interest or benefit in the operation of said companies other than that of receiving such portion of the clear profits of each as may be by the board of directors of each of said companies from time to time declared as dividends, and allotted to this defendant according to its ownership of the capital stock of each thereof.

(6) This defendant admits that it is now engaged in the interstate transportation of anthracite coal mined by the aforesaid companies, and that it is its purpose to continue such transportation unless it should be required to desist from the same by the order of this honorable court, but it denies that in so doing it is acting in violation of law.

(7) This defendant admits that anthracite coal is an article or commodity other than timber and the manufactured products thereof, as averred in paragraph 8 of the bill, but it denies, under the
24 advice of counsel, that any coal which it transports other than that which may be intended for its use in the conduct of its business as a common carrier, is either owned by it in whole or in part, or that it has any interest, direct or indirect, therein.

(8) This defendant alleges that the majority of the capital stock of the Lehigh and Wilkes-Barre Coal Company, as hereinbefore set forth, constituted a part of its assets in 1877 when it was adjudged insolvent by the Court of Chancery of the State of New Jersey and a receiver appointed, and it was at that time the guarantor of bonds of a par value of $11,500,000 theretofore issued by said coal company. Pursuant to the plan and agreement of reorganization dated February 23, 1878, to which the receiver of the said Court of Chancery was a party, and which was duly approved by the said Court of Chancery by its order of December 19, 1877, in the suit in which the Lehigh Coal and Navigation Company was complainant, $6,600,000 of the capital stock of the said coal company was pledged as part of

the security for its so-called "Adjustment mortgage," dated May 1, 1878, executed pursuant to said agreement and made to secure bonds of a par value of $5,550,000, payable May 1, 1903, and the said stock was on July 1, 1887, transferred and assigned to, and is now held by the Central Trust Company of New York as trustee under the general mortgage executed by this defendant, dated July 1, 1887, to secure an issue of $50,000,000 of bonds, the principal of which is due July 1, 1987, of which bonds to an aggregate amount of $45,091,000 have been issued and are now outstanding in the hands of the public. A copy of said mortgage is hereto annexed, marked "Exhibit A," and made a part of this answer.

25 (9) This defendant alleges that at and about the time of its acquisition of the capital stock of the Honey Brook and the Wilkes-Barre Coal and Iron companies, as hereinbefore set forth, and for the purposes of securing for itself the transportation of the anthracite coal produced by the mines owned by these companies and other companies in the State of Pennsylvania, this defendant, on March 31, 1871, leased the railroad of the Lehigh Coal and Navigation Company, known as the Lehigh and Susquehanna Railroad, extending from Phillipsburg, in the State of Pennsylvania, to Union Junction, in Luzerne County, Pennsylvania, together with various branches thereof connecting it with different anthracite coal mines. This lease was subsequently modified by agreement made May 29, 1883, between the Lehigh Coal and Navigation Company, this defendant, and the Philadelphia and Reading Railroad Company, and these two agreements were afterwards modified by a third, dated June, 1887, between the Lehigh Coal and Navigation Company and this defendant. Copies of the said lease and the two agreements modifying the same are hereto annexed, marked "Exhibits B, C, and D," respectively, and form part of this answer.

Under these agreements it is provided amongst other things that the aggregate rental, which is fixed at one-third of the gross receipts from the operation of the demised premises, shall never in any year, after May 1, 1883, be less than $1,414,400, and that whenever it shall exceed the sum of $2,043,300, after 1892, the surplus over one-third of the gross receipts shall be received by this defendant.

This lease constitutes a valuable asset of this defendant so
26 long as it continues to transport the coal of the Lehigh and Wilkes-Barre Coal Company in interstate commerce. Like its stock in the Lehigh and Wilkes-Barre Coal Company aforesaid it is included in the assets covered by its said general mortgage. The lease would be valueless and involve this defendant in serious loss if it could not continue to transport over the leased railroad the coal mined by the Lehigh and Wilkes-Barre Coal Company.

(10) This defendant alleges that its gross earnings during its last fiscal year, ending June 30, 1907, were $25,687,403.37, of which $19,417,930.47 were derived from merchandise and anthracite coal traffic. Of the $19,417,930.47 gross earnings derived from merchan-

dise and anthracite coal traffic, $9,312,268.04 was derived from the transportation of anthracite coal and $10,105,662.43 from the transportation of other commodities. During this period the receipts from anthracite coal transported by this defendant represented over 48 per cent of its entire freight receipts.

Its capitalization is as follows:

Stock	$27,436,800
Funded debt	54,260,000

Of the aforesaid amount of gross earnings derived from the transportation of anthracite coal, the greater part was received by this defendant for the transportation of such coal for the Lehigh and Wilkes-Barre Coal Company, a majority of whose stock is owned by it.

Substantially the same proportionate part of this defendant's earnings in previous years has been derived from the transportation of anthracite coal, and substantially the same proportionate part of these earnings have come from the Lehigh and Wilkes-Barre Coal Company.

27 More than seventy-five per cent of the anthracite coal transported by this company during its last fiscal year ending June 30, 1907, and in previous years, constituted interstate commerce, of which the greater part was coal produced by the Lehigh and Wilkes-Barre Coal Company.

In addition to the portion of its earnings directly derived from the transportation of anthracite coal for the said coal companies in which it has a stock interest, a very large part of its earnings are derived from the freight and passenger traffic incidental to and dependent upon the operation of the mines and collieries of the said coal companies. If this defendant were deprived of the earnings derived from the transportation of the coal of the said coal companies, its business could not be operated except at a very great net loss.

(11) This defendant alleges that throughout its corporate existence the transportation of coal from the anthracite coal fields of Pennsylvania has constituted its principal business, and the chief source of its earnings. Its railroad lines have been from time to time extended, the control of other railroads acquired, and its facilities and equipment increased at great expense to meet the increasing demands of the markets of the United States for this coal in reliance upon the rights and franchises conferred by the statutes of New Jersey and Pennsylvania, aforesaid, and upon the prospective earnings from the transportation of anthracite coal in interstate commerce. Large factories and other industries have been established and cities and towns have grown up on its lines in New Jersey in reliance upon its continued ability to supply them with anthracite coal for fuel and power.

The value of its property is and at all times has been dependent
8 upon its revenue from such transportation of anthracite coal, and this value would be greatly impaired if it could not so

transport such coal from the mines of the coal companies in which it has a stock interest.

A very large proportion of the anthracite coal produced from the properties of the aforesaid coal companies has been continuously transported either wholly or partly to its destined markets over the railroads of this defendant, and many of the said properties and the most largely producing of them are located either directly upon or so contiguous to railroads operated or controlled by this defendant as to make said railroads the only reasonably practical and conveniently available avenues of transportation whereby the coals produced therefrom can be, as they now are and heretofore have been, transported to and delivered at accustomed markets and other points of consumption for manufacturing, domestic, and transportation uses, both without and within the State of Pennsylvania.

This defendant purchased an interest in the capital stock of aforesaid companies engaged in mining and dealing in coal, as hereinbefore set forth, for the purpose of securing to itself the transportation of the product of such companies in interstate commerce, and has expended large sums of money in extending its l nes and constructing branches and sidings to the collieries of said coal companies, and in providing other facilities in order to receive and so transport the product of their collieries.

The value of the stocks of said companies is largely dependent upon the right and ab'lity of th's defendant to transport the coal owned or produced by them out of Pennsylvania to markets in other States, and such stocks would be greatly depreciated in value
29 if this defendant should be prohibited from transporting the product of said companies in interstate commerce.

It has also expended large sums in coal trestles, coal pockets, terminal facilities, storage yards, docks, and wharves at the ports of New Jersey and New York, in and about New York Harbor, for its present and prospective anthracite coal business.

If it should be deprived of the right to transport in interstate commerce the coal mined by the coal companies in which it has a stock interest, the value of such lines and branches and of these coal trestles, coal pockets, terminal facilities, storage yards, docks, and piers would be to a large extent destroyed.

(12) This defendant, further answering, says that anthracite coal is an article of prime necessity and is universally used for domestic purposes throughout New England and the Middle Atlantic States, and to a great extent throughout other sections of the country. The source of the entire supply, save a few small deposits of inferior quality, is located within the State of Pennsylvania, and the deposits extend over an area of only about 484 square miles, divided for trade purposes into three "regions," the Wyoming (sometimes called the Lackawanna) region, the Lehigh region, and the Schuylkill region. Ninety per cent, approximately, of the entire unmined area of anthracite coal is owned or controlled by the following named com-

panies, or by "subsidiary coal companies," so called, that is, companies in which they have an entire or controlling stock interest, viz, the Reading Company, the Pennsylvania Railroad Company, the Delaware, Lackawanna and Western Railroad Company, the Leehigh Valley Railroad Company, the Central Railroad Company of New Jersey, the Delaware and Hudson Company, the Erie
30 Railroad Company, and the New York, Ontario and Western Railroad Company, and from seventy to seventy-five per cent of the annual supply of anthracite coal in the United States is, and for many years past has been, produced either directly by said companies, as in the case of the Delaware, Lackawanna and Western Railroad and Delaware and Hudson companies, or through the agency of the said "subsidiary" coal companies.

The entire distribution of anthracite coal in and into the different States of the Union and Canada for the year 1905, the latest normal year in which there was no strike and for which complete statistics are at hand, was as follows:

New England States	8,692,504	tons
New York	18,125,419	"
New Jersey	7,212,341	"
Supply coal to railroads	4,643,426	"
Southern States	2,080,088	"
Western States	6,904,314	"
Canada	2,187,450	"
Other foreign countries	42,533	"
Pacific coast	1,743	"
Pennsylvania	11,520,383	"
	61,410,201	tons

Approximately four-fifths of this entire production of anthracite coal was transported in interstate commerce over the railroads named from Pennsylvania to markets in other States and Canada. Approximately the same proportion of the entire production of anthracite coal has been so transported from Pennsylvania to other States and countries for many years before 1905 and ever since. The total out-
put of anthracite coal for the year 1906 was 55,698,595 tons.
31 That for the year 1907 exceeded 68,000 000 tons. That part of the output of anthracite not consumed in the State of Pennsylvania is carried chiefly to tide water at New York Harbor, and is thence transported by water and by railroad to points in New England and the Middle Atlantic States, where the great bulk of the anthracite output is consumed. New York Harbor is the principal distributing point for anthracite coal.

(13) This defendant, while insisting that the interstate transportation of coal by it, which has been mined or produced by the aforesaid coal companies, is not prohibited by the act of Congress, approved

June 29, 1906, further states and shows to the court that the clause of said act which it is averred it has violated because of the interstate transportation of such coal, is violative of and repugnant to the Constitution of the United States in the following particulars:

(a) That it does not permit and undertake to regulate the transportation in interstate commerce of anthracite coals produced from the mines of the several coal companies hereinbefore mentioned; but on the contrary, undertakes to absolutely prohibit transportation thereof, and therefore is not a "regulation" of interstate commerce, but a "prohibition" of such commerce; and consequently is not within the scope of the commerce clause of the Constitution.

(b) That the effect of said clause will constitute a taking of the defendant's property, corporate rights, and franchises without due process of law and without compensation, and that in its result this defendant will be denied the equal protection of the laws.

32 (c) That said clause is "class legislation," unduly and unjustly discriminative in its results, in that it expressly permits railroad companies to transport in interstate commerce timber and the manufactured products thereof which may be manufactured or produced by any such company, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect; and prohibits transportation in interstate commerce of other commodities, including anthracite coals—an increment in such commerce exceedingly important and highly essential to the public welfare; and is also unjustly discriminative "class legislation," in that it arbitrarily denies to one class of common carriers under the act to regulate commerce and its several amendments the right and privilege of transportation of certain commodities, but imposes no such restrictions or prohibition on other common carriers under said act and its amendments.

(d) That the penalties imposed by the statute for violations thereof are of such magnitude, and so unduly excessive and extortionate, as to be substantially destructive of the property and franchises of the carriers affected thereby, and in respect to such carriers to constitute a denial of the equal protection of the law.

(e) That the effect of said law is to prevent the transportation by interstate commerce, out of the State of Pennsylvania, of all the anthracite coal owned by railroad companies or by coal companies in the stock of which they have an interest, comprising between seventy and seventy-five per cent of the entire production of anthracite

33 coal, the greater part of which is and for many years has been transported to the ports of New York and New Jersey, and to cause the same, so far as it continues to be transported, to be brought for shipment to the ports of Pennsylvania, whereby preference would be given to the ports of one State over those of other States, contrary to article 1, section 9, clause 6, of the said Constitution.

And this defendant having fully answered all material allegations in said bill of complaint contained, prays that it may be hence dis-

missed with its reasonable costs in this behalf most wrongfully sustained.

[SEAL] THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
By GEO. F. BAER, *President.*

Attest:

G. O. WATERMAN,
Secretary.

JACKSON E. REYNOLDS,
Solicitor.

ROBERT W. DE FOREST,
Counsel.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Be it remembered that on this 10th day of June, 1908, personally appeared before me, the undersigned, a notary public of the State of Pennsylvania, in the said county of Philadelphia, George F. Baer, who being by me duly sworn according to law, deposes and says that he is president of the Central Railroad Company of New Jersey, and that the facts set forth in the foregoing answer of said company are correctly and truly stated according to the best of his knowledge, information, and belief.

GEO. F. BAER.

Sworn to and subscribed before me the day and year aforesaid, as witness my hand and official seal hereto affixed.

[SEAL.]

GEORGE GOWEN PARRY,
Notary Public.

Commission expires Jan. 16th, 1911.

General mortgage of the Central Railroad Company of New Jersey to the Central Trust Company of New York, trustee, dated July 1, 1887, to secure $50,000,000 bonds.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

GENERAL MORTGAGE.

Indenture made the first day of July, eighteen hundred and eighty-ven, between the Central Railroad Company of New Jersey, a corration of the State of New Jersey, herein called the "Railroad mpany," party of the first part, and the Central Trust Company New York, trustee, herein called the "Trustee," party of the second rt.

Whereas, the Railroad Company is indebted to various individuals l corporations for the following amounts, amongst others:

1) First mortgage bonds, dated December 15, 1868, due February 890, bearing interest at the rate of 7 per cent per annum, secured

by mortgage of even date therewith, to John C. Green and Moses Taylor, trustees, of which there are now outstanding bonds of the par value of $5,000,000.

40 (2) Convertible bonds, dated November 1, 1872, due November 1, 1902, bearing interest at the rate of 7 per cent per annum, secured by the so-called "Consolidated mortgage," dated September 1, 1874, to the New York Guaranty and Indemnity Company, trustee, and by the so-called "Adjustment mortgage," dated May 1, 1878, to John S. Kennedy, John Edgar Johnson, and Jacob D. Vermilye, trustees, of which there are now outstanding bonds of the par value of $4,400,000.

(3) Consolidated bonds, dated September 1, 1874, due July 1, 1899, bearing interest at the rate of 7 per cent per annum, secured by the mortgages last above mentioned as securing the convertible bonds, of which there are now outstanding bonds of the par value of $15,000,000.

(4) Adjustment bonds, dated May 1, 1878, due May 1, 1903, or at any time prior thereto at the option of the Railroad Company, bearing interest at the rate of 7 per cent per annum, secured by mortgage of even date therewith, to John S. Kennedy, John Edgar Johnson, and Jacob D. Vermilye, trustees, whereof there are now outstanding bonds of the par value of $5,254,000.

(5) Convertible debenture bonds, dated September 15, 1883, due May 1, 1908, bearing interest at the rate of 6 per cent per annum, whereof there are now outstanding bonds of the par value of $3,264,000.

(6) Bonds of the Newark and New York Railroad Company, payment of which has been assumed by the Central Railroad Company of New Jersey, dated July 1, 1867, due July 1, 1887, bearing interest at the rate of 7 per cent per annum, of which there are now outstanding bonds of the par value of $600,000.

41 (7) Bonds of the Lehigh Coal and Navigation Company, due December 15, 1897, bearing interest at the rate of 6 per cent per annum, amounting in the aggregate to $2,310,000, payment of which has been assumed by the Central Railroad Company of New Jersey pursuant to the agreement between said companies made March 31, 1871.

(8) Certificates of the following named car trust associations, whereof there are now outstanding certificates of the par value affixed to the name of each car trust association, viz.:

Name.	Amount of certificates outstanding.
The Railroad Car Trust of Philadelphia	$52,800.00
The New Jersey Car Trust Association (Limited)	50,000.00
Central New Jersey Car Trust Association	80,000.00
Guarantee Car Trust Association	700,000.00
Central Railroad Company of New Jersey Car Trust Association	823,000.00

And whereas, the railroad company is obligated to pay as portion of its fixed charges, interest, or dividends at the rate of not less than 6 per cent per annum on the following bonds and stocks:

(1) Bonds of the New Jersey Southern Railway Company, dated July 15, 1879, due July 15, 1899, bearing interest at the rate of 6 per cent per annum, secured by mortgage of even date therewith, to Henry Day, Frederick W. Downer, and Henry S. Little, trustees, whereof there are now outstanding bonds of the par value of $1,590,600.

(2) Bonds of the Long Branch and Sea Shore Railroad
42 Company, dated December 1, 1869, due December 1, 1899, bearing interest at the rate of 7 per cent per annum, secured by mortgage to George B. Upton, Henry L. Gaw, and Abraham Browning, trustees, whereof there are now outstanding bonds of the par value of $200,000.

(3) Stock of the New York and Long Branch Railroad Company of the par value of $2,000,000, entitled to semiannual dividends at the rate of 7 per cent per annum, of which stock of the par value of $1,500,000 is owned by the Railroad Company, and stock of the par value of $500,000 is owned by various individuals and corporations, subject, however, to the right of the Railroad Company to purchase the same on notice, at par and accrued dividends.

(4) Stock of the South Branch Railroad Company of the par value of $438,300, entitled to quarterly dividends at the rate of 6 per cent per annum, all of which the Railroad Company is entitled to purchase on notice, at par and accrued dividends.

(5) Stock of the West End Railroad Company of the par value of $43,700, entitled to quarterly dividends at the rate of 10 per cent per annum, all of which the Railroad Company is entitled to purchase on notice, at par and accrued dividends.

(6) Stock of the Newark and New York Railroad Company of the par value of $87,350, entitled to quarterly dividends at the rate of 7 per cent per annum, all of which the Railroad Company is entitled to purchase on notice, at par and accrued dividends.

And whereas, the board of directors of the Railroad Company
43 have deemed it expedient, for the purpose of paying off the aforesaid and other obligations of the Railroad Company, and for the purpose of purchasing said stocks and bonds in order to reduce its fixed charges, and for other lawful purposes, to borrow money and issue bonds, not exceeding $50,000,000 in amount, payable not more than one hundred years from the date hereof, in gold coin of the United States of or equivalent to the present standard of weight and fineness, or in sterling money of Great Britain, bearing interest at such rates as may be fixed at the period of issue from time to time, but not exceeding 5 per cent per annum, with coupon interest payable semiannually, and registered interest payable quarterly, such bonds to be secured by general mortgage covering all the property of the Railroad Company, including all the securities representing the control of the necessary constituent companies, and all equipment now

subject to special car trust liens, so conditioned as to preserve to the new bonds the protection of all existing liens by including in such general mortgage all bonds secured by prior mortgages which may be exchanged for said general mortgage bonds, and to give the additional security of all new property acquired by the proceeds thereof.

And whereas to that end the board of directors of the Railroad Company have duly authorized and directed an issue of coupon and registered bonds to an amount not exceeding fifty million dollars, payable on the first day of July, 1987, and bearing interest from the first day of July, 1887, at a rate not exceeding five per cent per annum, payable semiannually as to the coupon bonds on the first days of January and July in each year, and payable quarterly as to the registered bonds on the first days of January, April, July, and
44 October in each year, to be sealed with the corporate seal of the Railroad Company, signed by its president or vice-president and secretary, and duly authenticated by the certificate of the trustee under this mortgage securing payment thereof, such coupon bonds to be for $1,000 each and to have interest coupons thereto attached with the signature of the treasurer of the Railroad Company engraved thereon, and such registered bonds to be in denominations of $500, $1,000, $5,000, $10,000, and $50,000, which coupon bonds are to be numbered from 1 to the highest number thereof issued, and which registered bonds are to be lettered differently, according to their denomination, and those of each denomination numbered from 1 to the highest number of such denomination issued, those of the denomination of five hundred dollars being indicated by the numeral "D," those of the denomination of one thousand dollars by the numeral "M," those of the denomination of five thousand dollars by the numeral "V," those of the denomination of ten thousand dollars by the numeral "X," and those of the denomination of fifty thousand dollars by the numeral "L." Said bonds, coupons, and certificates are to be substantially in the forms following, respectively:

(Form of coupon bond.)

$1,000. United States of America. No.—.

The Central Railroad Company of New Jersey. General mortgage 5% one hundred year gold bond.

Principal payable July 1, A. D. 1987. Interest payable semiannually, January 1st and July 1st.

For value received the Central Railroad Company of New
45 Jersey promises to pay to the bearer hereof, at its office in the city of Jersey City, or at its office or agency in the city of New York, on the first day of July, 1987, one thousand dollars in gold coin of the United States of or equivalent to the present standard of weight and fineness, and on presentation and surrender of the annexed coupons, as they shall severally become due, to pay interest on such principal sum, in like gold coin

at the rate of five per cent per annum, payable semiannually on the first days of January and July in each year, at the said offices or agency until such principal shall be paid.

This bond is one of an issue of coupon and registered bonds, limited in the aggregate to $50,000,000, the payment of the principal and interest of which is equally secured by a mortgage or deed of trust of even date herewith, conveying unto the Central Trust Company of New York, in trust, the railroad property, equipment, and franchises of the said Railroad Company, and other property described and mentioned in said mortgage or deed of trust, upon the terms and conditions therein set forth.

The holder of this bond may at any time convert the same into a registered bond of like amount upon surrender hereof at the said office or agency in the city of New York.

If default be made in the payment of any interest on any of said bonds, the principal hereof may be made due and payable as provided in said mortgage or deed of trust.

The principal and interest of this bond are payable without any deduction for any taxes now or hereafter levied by the United States or by any State, county, or municipal authority, which the said company may be required to deduct therefrom, the company hereby agreeing to pay the same.

46 This bond shall not be valid until authenticated by the certificate of the trustee endorsed hereon.

In witness whereof the Central Railroad Company of New Jersey has caused its corporate seal to be hereunto affixed and attested by its secretary, and this bond to be signed by its president, or vice-president, this first day of July, 1887.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

[SEAL.] By , *President.*

Attest:

, *Secretary.*

(Interest coupon.)

$. No. .

On the first day of (January or July) , the Central Railroad Company of New Jersey will pay to bearer at its office or agency in Jersey City or in the city of New York twenty-five dollars in gold coin of the United States, being six months' interest then due on its general mortgage bond No. .

, *Treasurer.*

(Trustee's certificate.)

This bond is one of the issue of bonds within mentioned, secured by the mortgage or deed of trust, dated July 1, 1887, executed by the Central Railroad Company of New Jersey to the undersigned

47 as trustee, which has been duly recorded, and the holder hereof is entitled to the benefit of the trust therein created.

CENTRAL TRUST COMPANY OF NEW YORK, *Trustee,*

By . *President.*

(Form of registered bond.)

United States of America.

$. No.

Registered bond certificate.

The Central Railroad Company of New Jersey. General mortga
5% one hundred-year gold bond.

Principal due July 1, A. D. 1987.

Interest payable quarterly—January 1st, April 1st, July 1st, a
October 1st.

For value received, the Central Railroad Company of New Jers
promises to pay to at its office in the city of Jersey Ci
or at its office or agency in the city of New York, on the first day
July, 1987, dollars in gold coin of the United States, of
equivalent to the present standard of weight and fineness, and to p
interest on such principal sum in like gold coin at the rate of fi
per cent per annum, payable quarterly on the first days of Janua
April, July, and October in each year, at the said offices or agen
until such principal shall be paid.

This bond is one of an issue of coupon and registered bonds, li
ited in the aggregate to $50,000,000, the payment of t
48 principal and interest of which is equally secured by a mo
gage or deed of trust, dated July 1, 1887, conveying unto t
Central Trust Company, of New York, in trust, the railroad proper
equipment, and franchises of the said Railroad Company, and oth
property described and mentioned in said mortgage or deed of tru
upon the terms and conditions therein set forth.

This bond is transferable only on the books of the said Railro
Company by the registered owner in person or by attorney upon su
render hereof.

If default be made in the payment of any interest on any of sa
bonds, the principal hereof may be made due and payable as pr
vided in said mortgage or deed of trust.

The principal and interest of this bond are payable without a
deduction for any taxes now or hereafter levied by the United Stat
or by any State, county, or municipal authority, which the said co
pany may be required to deduct therefrom, the company hereby agr
ing to pay the same.

This bond shall not be valid until authenticated by the certifica
of the trustee endorsed hereon.

In witness whereof, the Central Railroad Company of New Jers
has caused its corporate seal to be hereunto affixed and attested by
secretary, and this bond to be signed by its president, or vice-pre
dent, this day of .

[SEAL.] THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
By , *President.*

Attest:
, *Secretary.*

49 (Trustee's certificate.)

This bond is one of the issue of bonds within mentioned, secured by the mortgage or deed of trust, dated July 1, 1887, executed by the Central Railroad Company of New Jersey to the undersigned as trustee, which has been duly recorded, and the holder hereof is entitled to the benefit of the trust therein created.

CENTRAL TRUST COMPANY OF NEW YORK, *Trustee*,
By , *President*.

And whereas, the execution of this mortgage or deed of trust has been duly authorized by the board of directors of the Railroad Company to secure the payment of said bonds and of the interest thereon,

Now, therefore, this indenture witnesseth that the said the Central Railroad Company of New Jersey, party of the first part, in consideration of the premises and of one dollar to it paid by the said Central Trust Company of New York, party of the second part, receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of all the bonds aforesaid at any time outstanding, has given, granted, bargained, sold, aliened, remised, released, conveyed and confirmed, assigned, transferred and set over, and by these presents does give, grant, bargain, sell, alien, remise, release, convey and confirm, assign, transfer and set over unto the said party of the second part, its successors, heirs and assigns, forever, all and singular the railroads, property, franchises, rights, and privileges of the Railroad Company, which are more particularly described as follows:

50 First. All the railroads of the Railroad Company, viz, its railroad from the Hudson River, in the county of Hudson, to the Delaware River, in the county of Warren, in the State of New Jersey; also its branch railroad from Jersey City, in the county of Hudson, to the city of Newark, in the county of Essex; also its branch railroad from the city of Elizabeth, in the county of Union, to the city of Perth Amboy, in the county of Middlesex; which branch railroads were purchased and are owned by it, by the authority conferred upon it by its charter; also all its right, title, and interest in and to the telegraph lines on and along said railroads and branches; also all lands, grants of lands, lands under water, water rights, rights of way, buildings, improvements, tenements, and hereditaments now owned by it and used or necessary to retain for future use for operating the said railroads, branches, or any of them; together with all rights of way and trackage over other lines than the line of said company, station grounds, tracks, side tracks, switches and spurs, bridges, viaducts, culverts, fences and other structures, water stations, station houses, engine houses, car houses, woodhouses, warehouses, machine shops, workshops, ferry houses, wharves, docks, piers, superstructures, erections, furniture, and fixtures; also all rails, ties, machinery, tools, implements, fuel, material, and supplies whatsoever, now or hereafter owned by the Railroad

Company, or now or hereafter acquired and used for the locating, constructing, operating, renewing, replacing, repairing, and maintaining said railroads and telegraph lines, or any part thereof, or which are necessary to retain for future use for such purposes; together, also, with all betterments, additions, improvements, repairs, renewals, and replacements made to, on, or upon said railroads and telegraph lines, or any part or portion thereof, and all outstanding claims and dues, books, maps, surveys, profiles, engineers'
51 notes, vouchers, receipts, muniments of title, and letters patent, as well as all other papers and documents relating to said railroads or to the business thereof; together with all and singular the corporate rights, privileges, and franchises of the Railroad Company, acquired or to be acquired, connected with or relating to the said railroads, or any of them; and together with all the streets, ways, alleys, passages, waters, water courses, easements, rights, liberties, privileges, hereditaments, and appurtenances whatsoever unto any of the hereby granted and mentioned premises and estates belonging and appertaining or to belong and appertain, and the reversions and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, property, claim, and demand of every nature and kind whatsoever of the said party of the first part, as well at law as in equity, of, in, and to the same and every part and parcel thereof.

Second. The four tracts, lots or parcels of land next hereinafter described, all situate in the county of Hudson in the State of New Jersey, as hereinafter stated, that is to say:

1st. All that certain tract or parcel of land and premises situate in the city of Jersey City: Beginning at a point in the centre line of Washington street, distant two hundred and ninety (290) feet northerly from the centre line of the Central Railroad of New Jersey; thence (1st) northerly through the centre line of Washington street a distance of one hundred and fifty-five (155) feet, more or less, to a point twenty-three hundred and thirteen (2,313) feet southerly from the southerly side of Grand street; thence (2d) north seventy-three degrees and fifty minutes west (N. 73°, 50′ W.), as the needle pointed in 1872, and parallel with Grand street, to the
52 centre line of Jersey avenue; thence (3d) southerly along the centre line of said avenue, one hundred and sixty-five (165) feet, more or less, to a point distant two hundred and ninety (290) feet northerly at right angles from the centre line of the Central Railroad of New Jersey; thence (4th) westerly and parallel with the centre line of said railroad, five hundred (500) feet, more or less, to the original high-water mark on the west shore of Communipaw Bay, or cove; thence (5th) southeasterly along said high-water mark to a point distant fifty (50) feet northerly at right angles from the centre line of the Central Railroad of New Jersey; thence (6th) easterly and parallel with the centre line of said railroad to the centre line of Jersey avenue; thence (7th) northerly along the centre line of said avenue two hundred and forty-seven (247) and sixty-two one-hun-

dredth ($\frac{62}{100}$) feet to the end of the third course in this description; thence (8th) easterly and parallel with the centre line of said Central Railroad to the centre line of Washington street, the point or place of beginning.

2d. Also all that other certain tract or parcel of land and premises partly above and partly below the tide waters of New York Bay, situate in the city of Jersey City, described as follows: Beginning at a point in the centre line of Washington street, distant two hundred and ninety (290) feet southerly from the centre line of the Central Railroad of New Jersey; thence (1st) southerly along the centre line of Washington street, two hundred and eighty-three (283) and four-tenths ($\frac{4}{10}$) feet to the bulkhead put down by the Central Railroad Company of New Jersey on the riparian commissioners' exterior line for solid filling; thence (2d) diverging from the centre line of Washington street produced, sixty-two degrees and eighteen minutes
53 (62° 18′) to the southeast, one thousand three hundred and eight-five (1,385) feet, more or less, to the new exterior line for piers established by the riparian commissioners of the State of New Jersey, October first, eighteen hundred and seventy-four; thence (3d) returning to the place of beginning, and running westerly and parallel with the centre line of the Central Railroad of New Jersey to the centre line of Jersey avenue; thence (4th) southerly along the centre line of Jersey avenue four hundred and seven (407) and thirty-six one hundredths ($\frac{36}{100}$) feet; thence (5th) southeasterly and parallel with the second course in this description, three thousand three hundred and twenty-five (3,325) feet, more or less, to the exterior line for piers aforesaid; thence (6th) easterly along said exterior pier line, two thousand five hundred and thirty-five (2,535) feet, to the end of the second course in this description.

Also, and it is intended to include in the foregoing descriptions all the lands lying between the south line of the first tract and the north line of the second tract last hereinbefore described, and the lands lying east of said first and second tracts and the land between the same extending to the exterior line for piers on the Hudson River and New York Bay.

3d. Also all that other certain tract or parcel of land and premises situate in the city of Bayonne, described as follows: Beginning at a point on the southeast side of the right of way of the Central Railroad of New Jersey, and in the division line between lands formerly belonging to John J. Van Buskirk on the northeast, and Elizabeth Young and Christopher, her husband, on the southwest; thence (1st) southeasterly along said division line four hundred and
54 eighty-seven (487) feet, more or less, to lands now or formerly of Richard Cadmus; thence (2d) southwesterly along said Richard Cadmus' land two hundred and sixty-eight (268) feet, more or less, to a point in the centre of the north branch of the Platty Kill Creek, said point being the end of the second course in the conveyance from Richard Cadmus and wife and Hartman Vreeland and wife to the Central Railroad Company of New Jersey by deed dated

the 24th day of February, 1864, and recorded in book 107 of deeds, pages 72, &c.; thence (3d) southeasterly along the centre of said north branch one hundred and seventy-two (172) feet to a point; thence (4th) southwesterly still along the centre of said north branch one hundred and ninety (190) feet; thence (5th) still along the centre of said north branch, the general course being southerly, seventeen hundred and twenty (1,720) feet, more or less, to the intersection of the centre line of the Platty Kill Creek and its north and south branches; thence (6th) up the centre of the south branch of the Platty Kill Creek, its general course being northwest along the southerly line of lands conveyed by Peter C. Westervelt and wife to the Central Railroad Company of New Jersey, by deed dated November the 9th, 1862, and recorded in book 97 of deeds, page 396, one thousand three hundred and seventy (1,370) feet, more or less, to a point; thence (7th) still along the last-mentioned line, north sixty-nine degrees and forty-four minutes west (N. 69° 44′ W.), three hundred and seventy (370) feet, more or less, to a point; thence (8th) south forty degrees and four minutes west (S. 40° 04′ W.) one hundred and thirty-six (136) feet to a point, which point is the most northerly corner of the lot of land conveyed by John J. Van Buskirk and wife to the Central Railroad Company of New Jersey, by deed dated July 29th, 1863, recorded in book 102 of deeds, page 37; thence (9th) southeast-
55 erly along the northeasterly line of said lot three hundred and seventy (370) feet, more or less, to lands formerly belonging to E. M. Patterson; thence (10th) southwesterly along the southeasterly line of said lot and the southeasterly side of a lot conveyed by John Van Buskirk, jr., and wife to the Central Railroad Company of New Jersey, by deed dated December 7th, 1863, and recorded in book 106 of deeds, page 199, three hundred and seventy-eight (378) feet, more or less, to the southerly corner of the last-mentioned lot; thence (11th) north forty-eight degrees and sixteen minutes west (N. 48° 16′ W.), nine hundred and five (905) feet, more or less, to the southeasterly side of the right of way of the Central Railroad Company of New Jersey; thence (12th) northeasterly along the southeasterly side of the right of way of said company, two thousand and seventy-five (2,075) feet, more or less, to the point or place of beginning.

4th. Also all that other certain tract or parcel of land and premises situate in the city of Bayonne, described as follows: Beginning at a point in the high-water line of the Kill von Kull River, distant eight hundred (800) feet northeasterly at right angles from the centre line of coal pier No. 1 belonging to the Central Railroad Company of New Jersey; thence (1st) northwesterly and parallel with the centre line of said coal pier No. one, eleven hundred and thirty-five (1,135) feet, more or less, to one of the division lines of the property formerly belonging to Nicholas, James, and John Van Buskirk; thence (2d) northwesterly along said division lines, four hundred and sixty-five (465) feet, more or less, to a point where a right angle would strike the intersection of the centre lines of the Platty Kill Creek,

and its north and south branches; thence (3d) northeasterly and
56 at right angles to the last-mentioned line, three hundred and seventy (370) feet, more or less, to the intersection of the centre lines of the Platty Kill Creek, and its north and south branches; thence (4th) southeasterly along the centre line of the Platty Kill Creek, ten hundred and twenty-five (1,025) feet, more or less, to a point distant fifteen hundred (1,500) feet northeasterly at right angles from the centre line of coal pier No. 1 aforesaid; thence (5th) southeasterly and parallel with the centre line of said coal pier No. 1, ten hundred and ninety-five (1,095) feet to the high-water line of the Kill von Kull River; thence (6th) southwesterly along said high-water line, seven hundred (700) feet at right angle to the last mentioned line, to the point or place of beginning.

Together with the lands under water in the Kill von Kull in front of the above described tract between the high-water line and the exterior line for solid filling and for piers, respectively.

Third. A certain lease made by the New York and Long Branch Railroad Company to the Railroad Company, bearing date the sixth day of October, eighteen hundred and seventy-three, by which the said the New York and Long Branch Railroad Company leased its railroad from its intersection near Perth Amboy, with the Perth Amboy branch of the Railroad Company, on the north side of the Raritan River, and thence to Long Branch, in the county of Monmouth, for and during the continuance of the charters of both of the parties to said lease, and during the continuance of any renewals of both of said charters, and during the continuance of any re-charter of both of the companies parties to said lease, at and for certain rents, and on certain terms and conditions in said lease specified, and also
all the leasehold estate, right, title, and interest vested in or in
57 any wise belonging unto the Railroad Company, in or to the demised premises by virtue of the said lease; subject, however, to the terms of a certain agreement by and between the Central Railroad Company of New Jersey, the New York and Long Branch Railroad Company, the New Jersey Southern Railway Company, and the Pennsylvania Railroad Company, dated January 3rd, 1882. Also fifteen thousand (15,000) shares of the capital stock of the New York and Long Branch Railroad Company, amounting at par to fifteen hundred thousand dollars, now belonging to the Railroad Company.

Fourth. A certain lease made by the South Branch Railroad Company to the Railroad Company, bearing date the eighteenth day of March, eighteen hundred and sixty-two, by which the said South Branch Railroad Company did lease to the Railroad Company, its railroad from a point on the Central Railroad of New Jersey, at Somerville, to and into the town of Flemington, in the county of Hunterdon, New Jersey, for and during the continuance of the charters of both the parties to the last mentioned lease and for and during the continuance of any recharter of both of the companies to the said last mentioned lease, for and upon certain rents to be paid by the

Railroad Company to the said last mentioned lessor, and upon certain terms and conditions in the said last mentioned lease particularly specified, and also all the leasehold estate, right, title, and interest of the Railroad Company, in and to the said last mentioned railroad, by virtue of the said last mentioned lease, or otherwise, in any way.

Fifth. A certain tripartite agreement made between the Delaware and Bound Brook Railroad Company, the North Pennsylvania Railroad Company, and the Railroad Company, for a continuous
58 line of travel between New York and Philadelphia, bearing date the thirtieth day of March, eighteen hundred and seventy-six, and also all the rights, privileges, benefits, and advantages of the Railroad Company, by virtue of the said tripartite agreement.

Sixth. Bonds made and heretofore issued by the Lehigh and Wilkesbarre Coal Company to the amount of six millions one hundred and sixteen thousand dollars, including all coupons thereon which may remain from time to time unpaid, being the same bonds mentioned in the third item of the agreement for the equitable adjustment of the affairs of the Central Railroad Company of New Jersey without a foreclosure, dated 23d February, 1878.

Seventh. One hundred and thirty-two thousand shares of the capital stock of the said Lehigh and Wilkesbarre Coal Company of the par value of fifty dollars each, amounting in the aggregate, at par, to six millions six hundred thousand dollars, now belonging to the Railroad Company.

Eighth. Thirty thousand shares of the capital stock of the American Dock and Improvement Company of the par value of one hundred dollars each, amounting in the aggregate, at par, to three millions of dollars, now belonging to the Railroad Company.

Ninth. Eight thousand five hundred shares of the capital stock of the High Bridge Railroad Company of the par value of one hundred dollars each, amounting in the aggregate, at par, to eight hundred and fifty thousand dollars, now belonging to the Railroad Company.

Tenth. Three thousand shares of the capital stock of the Longwood Valley Railroad Company of the par value of one hundred
59 dollars each, making in the aggregate, at par, three hundred thousand dollars, now also belonging to the Railroad Company.

Eleventh. A certain lease bearing date the thirty-first day of March, A. D. eighteen hundred and seventy-one, made by the Lehigh Coal and Navigation Company to the Railroad Company, by which the said Lehigh Coal and Navigation Company did lease and demise unto the Railroad Company all the railroads of the said "The Lehigh Coal and Navigation Company within the State of Pennsylvania, including their bridge across the Delaware River, as follows, to wit:

"The Lehigh and Susquehanna Railroad, extending from Phillipsburg, in the State of New Jersey, to Union Junction, in Luzerne County, Pennsylvania, where it connects with the railroad built by the Union Coal Company, a distance of one hundred and five miles, more or less. Also the railroad known as the Nanticoke Railroad,

situate in said Luzerne County, extending from the Lehigh and Susquehanna Railroad at Ashley to the Newport mines, a distance of eight and one-half miles, more or less, with a branch from the same extending to the Lee mines, a distance of two miles, more or less, extending also from Ashley to Gardner's switch, a distance of four and one-half miles, more or less, also extending from Union Junction to the Everhart mines, a distance of three miles, more or less, and also extending from Mill Creek to the Enterprise mines, a distance of four miles, more or less; also the branch railroad in the County of Luzerne, known as the Nescopec Branch, extending from White Haven to Upper Lehigh, a distance of nine miles, more or less;
60 also the Nesquehoning Valley Railroad, situate in the counties of Carbon and Schuylkill, extending from Nesquehoning Junction to Tamanend, where it connects with the Catawissa Railroad, a distance of sixteen and one-half miles, more or less; also the Tresckow Railroad, in the counties of Schuylkill, Carbon, and Luzerne, extending from the Catawissa Railroad at Silver Brook to the Honey Brook mines, a distance of six and one-half miles, more or less; also the branch railroad in the counties of Northampton and Lehigh, known as the Coplay Branch, extending from Laubach station to the furnaces of the Thomas Iron Company, a distance of one mile, more or less; also the branch railroad in the county of Lehigh, extending from the railroad near Bethlehem, across the Lehigh River to a connection with the North Pennsylvania Railroad at South Bethlehem, a distance of fourteen hundred and twenty-eight feet, more or less; also the inclined planes in Luzerne County, with all the machinery connected therewith, extending from Ashley to Solomon's Gap station, a distance of three miles, more or less; together with all sidings, station houses, machine shops, and other appurtenances of said roads and branches, and also all and singular the roadways and also all the franchises of the Lehigh Coal and Navigation Company for maintaining and working the same and taking tolls thereon, and for demanding and receiving compensation for the use of the same; excepting and reserving out of the said demise the Nesquehoning tunnel, and the railroads or railways laid therein, and extending beyond the same, and also all railroads and railways extending from breakers into mines. To have and to hold the premises by said lease demised to said party of the first part, its successors and assigns, from the first day of April, eighteen hundred and seventy-one, for
61 and during the continuance of the charters of said companies, and any renewals of the same, under and subject nevertheless to all the mortgages existing on the said demised premises. Provided, however, that the term of the lease of the Nesquehoning Railroad above mentioned, shall not extend beyond the term of nine hundred and ninety-nine years, from the fourth of November, eighteen hundred and sixty-eight, less one day," at and for certain rents and conditions, in the said last-mentioned lease specified, and also all the leasehold estate, right, title, and interest vested in or in any wise

belonging unto the said party of the first part in and to the said last-mentioned and demised premises, or any part thereof, by virtue of the said last-mentioned lease or otherwise.

Also a certain agreement modifying said lease, bearing date the 28th day of June, 1887, made between the Lehigh Coal and Navigation Company and the Railroad Company.

Twelfth. All the locomotives, tenders, passenger cars, baggage cars, freight cars, coal cars, and all other engines, cars, carriages, rolling stock, equipments, and all contracts and agreements for the purchase thereof; also all tools and machinery owned or to be owned by the Railroad Company, and all renewals thereof by substitution, repair, or otherwise, and used or necessary to retain for future use on any of the railroads included in this indenture of mortgage, or on any railroad, any interest in which as owner, lessee, stockholder, or otherwise, is hereby conveyed, assigned, and transferred to the said party of the second part.

Also all the tolls, rents, revenues, issues, profits, and income from said railroads and property, and all the corporate and other rights,
privileges, franchises, and appurtenances of or belonging to
62 the Railroad Company, and now owned, acquired, or possessed,
or that may be hereafter owned, acquired, or possessed by the Railroad Company, including every privilege of exemption and immunity from taxation.

Thirteenth. All the tug-boats, ferry-boats, steamboats, floats, barges, and other floating equipment now belonging to the Railroad Company, and also every ferry and right of ferriage belonging or in any wise appertaining to the Railroad Company, its successors or assigns, or used in connection with the aforesaid railroads, or with any of them; and also all the lands and real estate of the Railroad Company, situate in the city of New York, on the west side of West street, opposite to, or nearly opposite to the foot of Liberty street, now belonging to the Railroad Company, and used as and for its ferry, and for its transportation and other business carried on and in connection with said ferry, with the hereditaments and appurtenances thereunto belonging, or in any wise appertaining.

Fourteenth. Eight hundred and fourteen shares of the capital stock of the Constable's Hook Railroad Company, of the par value of one hundred dollars each, amounting in the aggregate at par to eighty-one thousand four hundred dollars.

Fifteenth. Seven hundred and ninety-six shares of the capital stock of the Manufacturers' Railroad Company, of the par value of one hundred dollars each, amounting in the aggregate at par to seventy-nine thousand six hundred dollars.

Sixteenth. One thousand seven hundred and seventy-three shares
of the capital stock of the Lake Hopatcong Railroad Company,
63 of the par value of one hundred dollars each, amounting in the
aggregate at par to one hundred and seventy-seven thousand three hundred dollars.

Seventeenth. Fifteen thousand nine hundred and six shares of the preferred capital stock of the New Jersey Southern Railway Company, of the par value of one hundred dollars each, amounting in the aggregate at par to one million five hundred and ninety thousand six hundred dollars.

Eighteenth. Two thousand four hundred shares of the capital stock of the Tom's River Railroad Company, of the par value of one hundred dollars each, amounting in the aggregate at par to two hundred and forty thousand dollars.

Nineteenth. Six thousand shares of the capital stock of the Vineland Railroad Company, of the par value of one hundred dollars each, amounting in the aggregate at par to six hundred thousand dollars.

Twentieth. All of the hereinbefore recited issues of bonds, stocks, and certificates, for the purchase of which bonds are reserved as herein provided, which may from time to time be transferred and delivered to the trustee under the terms of this mortgage, viz:

Name of securities.	Total par value of amount outstanding.
First mortgage bonds of the C. R. R. Co. of N. J	$5,000,000
Convertible bonds of the C. R. R. Co. of N. J	4,400,000
Consolidated bonds of the C. R. R. Co. of N. J	15,000,000
Adjustment bonds of the C. R. R. Co. of N. J	5,254,000
64 Bonds of the Newark & New York R. R. Co	600,000
Bonds of the New Jersey Southern Railway Co	1,590,600
Bonds of the Long Branch & Seashore R. R. Co	200,000
Bonds of the Lehigh Coal and Navigation Company	2,310,000
Stock of the New York & Long Branch R. R. Co	500,000
Stock of the South Branch R. R. Co	438,300
Stock of the West End R. R. Co	43,700
Stock of the Newark and New York R. R. Co	87,350
Certificates of the Railroad Car Trust of Philadelphia	52,800
Certificates of the New Jersey Car Trust Association (Limited)	50,000
Certificates of the Central New Jersey Car Trust	80,000
Certificates of the Guarantee Car Trust	700,000
Certificates of the Central Railroad Company of New Jersey Car Trust	823,000
	37,129,750

Twenty-first. The interest of the Railroad Company in a certain lease made by the Dover and Rockaway Railroad Company, bearing date April 26th, 1881, to the Longwood Valley Railroad Company, the entire capital stock of which is owned by the Railroad Company, by which lease the Dover and Rockaway Railroad Company leased its railroad for and during the continuance of the charters of both parties to the said lease, for and upon certain rents to be paid to the said lessor, and upon certain conditions in the said lease particularly

specified, and also all the leasehold estate, right, title, and interest of the Railroad Company in and to the said last-mentioned railroad, by virtue of the said last-mentioned lease, or otherwise, in any way.

65 Twenty-second. A certain lease made by the Ogden Mine Railroad Company to the said party of the first part, bearing date November 4th, 1881, by which the said Ogden Mine Railroad Company leased its railroad to the Railroad Company, for and during the continuance of the charters of both parties to the said last-mentioned lease, for and upon certain rents to be paid by the Railroad Company to the said last-mentioned lessor, and upon certain conditions in the said last-mentioned lease particularly specified, and also all the leasehold estate, right, title, and interest of the Railroad Company, in and to the said last-mentioned railroad, by virtue of the said last-mentioned lease, or otherwise, in any way.

Twenty-third. All the property, real, personal, and mixed, which may at any time hereafter be acquired by the Railroad Company, with the proceeds of bonds secured hereby.

To have and to hold all and singular the property hereinbefore described, real, personal, and mixed, and all the railroads, premises, property, rights, franchises, and estates hereby conveyed, or intended to be conveyed, with all and singular the reversions, remainders, tolls, rents, revenues, issues and profits, privileges and appurtenances, now or hereafter belonging or in anywise appertaining thereto, unto the said party of the second part, its successor and successors, heirs and assigns forever, in trust, nevertheless, under the terms and provisions hereinafter set forth, for the persons and corporations, firms and partnerships, and for their benefit, security, and protection, who shall hold the aforesaid coupon and registered bonds, or any or either of them, and for the enforcing of the payment thereof, when

66 payable in accordance with the true intent and meaning of the stipulations of this mortgage and of said bonds and interest coupons, and without preference of any of said bonds over any of the others by reason of difference in the rates of interest, in the time of the issue or negotiation thereof, or otherwise. Provided however, and these presents are upon the express condition, that if the Railroad Company, its successors or assigns, shall well and truly pay, or cause to be paid, unto the holders of said bonds and interest coupons to be issued as aforesaid, the principal and interest to become due at the times and in the manner stipulated in said bonds and in said interest coupons, according to the true intent and meaning thereof, and shall well and truly keep, perform, and observe all and singular the covenants, promises, and conditions in said bonds and in this mortgage expressed, to be kept, performed, and observed by the Railroad Company, then this mortgage and the estate and rights hereby granted shall cease, determine, and be void, otherwise to be and remain in full force.

It is hereby declared, covenanted, and agreed, by and between the parties hereto, and the Railroad Company for itself, its successors and assigns, doth hereby covenant and agree to and with the respec-

tive persons and corporations, firms and partnerships, who shall hold the bonds and interest coupons aforesaid, or any or either of them, that the further trusts, uses, purposes, conditions, and covenants for and upon which the rights, franchises, and property, real and personal, hereinbefore described, are conveyed to, and are to be held and disposed of by the trustee, are as follows:

First. The Railroad Company will fully and entirely pay off
67 and satisfy the whole of the said bonds, principal, and interest, according to the terms thereof, without delay and without deductions from either said principal or interest for any taxes, assessments and governmental or other charges now or hereafter lawfully imposed upon the premises, franchises, and property hereby conveyed, or intended so to be, or upon the said bonds or any interest thereon, either by the United States, or by any State, county, or municipal authority, which the Railroad Company may be required to deduct therefrom. When and as the interest coupons annexed to the bonds secured hereby mature and are paid, they shall be cancelled. No purchase or sale of any of the said coupons, or interest, nor any advance or loan upon the same, and no redemption of the said coupons, or interest, by or on behalf of the Railroad Company, shall, as between the purchasers or assignees of such coupons or interest and the holders of said bonds, operate as keeping the said coupons or interest alive or in force as a lien upon the mortgaged premises against the holders of said bonds, after the sale or assignment of said coupons or interest separate from the bonds from which such coupons are detached or on which such interest shall accrue. Until default shall be made in the payment of the principal or interest of the bonds hereby secured, or of some of them, or in respect to something herein required to be done, observed, kept, or performed by the Railroad Company, it and its successors and assigns shall be permitted, except as herein otherwise specially provided, to possess, manage, operate, and enjoy the railroads, equipment, and other property, rights, and franchises hereby conveyed, or intended so to be, and to receive and use the tolls, income, rents, revenues, issues, and profits thereof.

Second. If default shall be made in the payment of any
68 interest on any of the bonds hereby secured, and such default shall continue for ninety days after payment shall have been duly demanded in writing, then and thereupon the principal sum of all of said bonds shall, at the option of the trustee, become immediately due and payable, anything in said bonds or herein to the contrary notwithstanding; and, if requested to do so by a majority in interest of the holders of the bonds hereby secured and then outstanding, by an instrument or concurrent instruments in writing, signed and proved as hereinafter provided, or by vote at a meeting duly held, it shall be the duty of, and it is hereby made obligatory upon, the trustee to declare said entire principal sum due and payable as aforesaid, and the same shall thereupon become immediately due and payable; and a majority in interest of such bondholders may in like manner direct the trustee to refrain from making such declaration,

upon such terms and conditions as such majority shall deem proper; and a majority in interest of such bondholders may in like manner annul or reverse the declaration if already made by the trustee, and such principal sum shall thereupon cease to be due, anything herein contained to the contrary notwithstanding; but the action of the trustee or of the bondholders, in case of any default, shall not affect or impair the right of a majority in interest of such bondholders, in manner aforesaid, at any time while such default continues, to direct the trustee to declare such principal sum due, nor shall it in anywise affect any subsequent default on the part of the Railroad Company, or impair any right resulting therefrom.

Third. If default shall be made in the payment of any money, principal or interest, on any of the bonds hereby secured, or
69 in the performance of any other covenant of the Railroad Company herein contained, it shall be lawful for the trustee, at any time after payment or performance shall have been duly demanded, in writing, such default continuing, to proceed to enforce the rights of the trustee and of the bondholders under this mortgage, by foreclosure or by any other appropriate proceedings in any proper court for that purpose, as they, being advised by counsel learned in the law, shall deem most expedient for the interests of such bondholders.

Fourth. If default shall be made in the payment of any money, principal or interest, on any of the bonds hereby secured, and such default shall continue for ninety days after payment shall have been duly demanded in writing, it shall be lawful for the trustee, such default continuing, either personally, or by its agent or agents, attorney or attorneys, to enter into and upon all of the property, franchises, rights, and privileges hereby conveyed or intended so to be, and each and every part thereof, and to exclude the said company, its agents and servants, wholly therefrom, and having and holding the same to use, operate, manage, and control said railroads and other mortgaged premises, regulate the tolls for the transportation of passengers and freight thereon, and conduct the business thereof, either personally or by its superintendent, managers, receivers, agents, servants, or attorneys, to the best advantage of the interests as well of the public as of the holders of bonds secured hereby, in accordance with law. Such right of entry shall include the right to vote on all the shares of stock included in this mortgage, and to perform any acts and to make and execute any requests, requisitions, or other instruments as holders of the bonds included therein. Upon such
70 entry it shall be lawful for the trustee from time to time to insure or keep insured, at the expense of the trust estate, the rolling stock, tools, and machinery, and other property, buildings, bridges, and structures erected or provided for use in connection with said railroads, and whereof they shall become possessed as aforesaid, in the same manner and to the same extent as is usual with railroad companies; and likewise to make from time to time, at the expense of the trust estate, all necessary or proper repairs, renewals, and re-

placements thereto and thereon, as well in respect of the rolling stock or equipment as in respect of the railroad and appurtenances, and other property as may seem to it judicious; and to collect and receive all tolls, freights, incomes, rents, revenues, issues, and profits of the same, and every part thereof, and after deducting the expenses of operating said railroads and other mortgaged premises, and conducting the business thereof, and of all repairs, renewals, replacements, and all payments which may be made for taxes, assessments, insurance, and other proper charges upon the said premises and property, or any part thereof, as well as a just and reasonable compensation for its own services and compensation to all agents, clerks, servants, and other employees by it properly engaged and employed, the trustee shall apply the moneys arising as aforesaid to the payment of the interest in arrear (if any) or which shall after such entry become due and payable on the bonds outstanding and secured hereby, ratably to the person or parties entitled to receive the same, without any discrimination or preference between them on account of the date and dates of maturity or of the rate of interest of such bonds, or the times of their actual issue or otherwise.

Whenever, after entry as aforesaid, the net income from the
71 mortgaged property under the management of the trustee has been sufficient to pay all the interest in arrear on the bonds outstanding and secured hereby, the trustee shall, upon requisition in writing of the Railroad Company, restore said property to the Railroad Company, to possess, manage, operate, and enjoy the same, in like manner as before said entry. But such restoration shall not in any way affect the right of the trustee to enter, as herein provided, for any subsequent default.

Fifth. If default shall be made in the payment of any money, principal or interest, on any of the bonds hereby secured, and such default shall continue for ninety days after payment shall have been duly demanded in writing, it shall be the duty of, and it is hereby made obligatory upon, the trustee, upon requisition of one-eighth in interest of the holders of the bonds hereby secured and then outstanding, by an instrument or concurrent instruments in writing, signed and proved as hereinafter provided, and upon reasonable indemnity as hereinafter provided, to proceed forthwith to enforce the rights of the trustee and of the bondholders under this mortgage, by foreclosure or by any other appropriate proceedings in any proper court or otherwise, according to such requisition.

Sixth. If default shall be made in the performance of any covenant of the Railroad Company herein contained other than the payment of any money, principal or interest, on any of the bonds hereby secured, and such default shall continue for ninety days after performance shall have been duly demanded in writing, it shall be the duty of, and it is hereby made obligatory upon, the trustee, upon like requisition of one-eighth in interest of the holders of the bonds hereby secured and then outstanding, and upon indemnity
72 as aforesaid, to proceed forthwith to enforce the rights of the

trustee and of the bondholders under this mortgage, by foreclosure or by any other appropriate proceedings in any proper court, or otherwise, according to such requisition, subject to the power of a majority in interest of the holders of the said bonds, by requisition in writing signed and proved as hereinafter provided, or by vote at a meeting duly held, to instruct and require the trustee to waive such default and withdraw such proceedings, if begun, or to enforce the rights of the trustee and the bondholders by reason of such default, according to such requisition of said majority; provided that no action of the trustee or bondholders, or both, in waiving such default or otherwise, shall extend to or be taken to affect any subsequent default or to impair the rights resulting therefrom.

Seventh. Upon the filing of a bill in equity, or other commencement of foreclosure or other appropriate proceedings in any proper court, to enforce the rights of the trustee and of the bondholders under this mortgage, unless satisfactory cause to the contrary shall be shown, the trustee shall be entitled to the appointment by such court of a receiver or receivers of the property hereby mortgaged, and of the earnings, income, rents, revenues, issues, and profits thereof, pending such proceedings, with such powers as the court making such appointment shall confer.

Eighth. In case of any default on its part, as aforesaid, the Railroad Company shall not and will not set up, claim, or seek to take advantage of any appraisement, valuation, stay, extension, or redemption law now existing or which may hereafter exist in any State wherein any part of the mortgaged property is situated, in order to prevent or hinder the enforcement or foreclosure of this mort-
73 gage, or the absolute sale of the railroads, equipment, and other property, rights, privileges, and franchises hereby conveyed, or the final and absolute putting into possession thereof, immediately after such sale, of the purchaser or purchasers thereat, but hereby waives the benefit of all such laws.

Ninth. In case of any sale of the mortgaged property under the provisions hereof, any purchaser at such sale shall be entitled, in making settlement for or payment of the purchase money bidden, to turn in towards the payment thereof any of the bonds and matured and unpaid interest secured hereby held by such purchaser, counting such bonds and interest for that purpose at the sum which shall be payable to the holder thereof out of the net proceeds of such sale, as his just share of such net proceeds, after allowing for the proportion of payment which may be required in cash for the costs and expenses of the sale; and if such share of net proceeds shall be less than the amount then due upon such bonds, to make such settlement by receipting on such bonds the amount to be credited thereon.

Tenth. The Railroad Company, for itself and all persons and corporations lawfully claiming through or under it, or who may at any time become holders of liens junior to the lien of this mortgage, hereby expressly waives and releases all right to have the mortgaged property marshaled upon any sale thereof under the provisions of

this mortgage; and the trustee hereunder and any court in which foreclosure of this mortgage is sought, shall have the right, in their discretion, to sell the entire mortgaged property of every description, as a whole, subject to the right of a majority in interest of the holders of the bonds hereby secured then outstanding, by requisition
74 in writing or by vote at a meeting duly held, to direct the trustee to sell said property in such manner as they may deem best.

Eleventh. The rights and remedies secured to the holders of the said general mortgage bonds by this mortgage and the trusts therein declared, shall, as against the mortgaged premises and property and every part thereof, be exclusive of all other rights and remedies, and no part of the mortgaged premises shall be levied upon, taken in execution, or sold under any judgment or decree obtained by the holder or holders of any of the said bonds or interest thereon against the Railroad Company for the payment of either principal or interest of the bonds hereby secured, unless such judgments or decrees shall have been entered for the purpose of enforcing the trusts herein contained, it being intended for the better securing the largest possible price for the mortgaged premises and property in the event of the sale thereof that the mode of sale hereinbefore provided shall be exclusive of all others.

Twelfth. The Railroad Company shall and will pay and discharge all taxes, assessments, and governmental or other charges lawfully imposed upon the premises, franchises, and property hereby conveyed, or intended so to be, or upon any part thereof, and all such taxes, assessments, and charges upon the bonds secured hereby or any interest thereon, as the Railroad Company may be required to deduct therefrom, and will not suffer any matter or thing whatsoever whereby the lien hereof might or could be impaired.

Thirteenth. The Railroad Company shall maintain always, during the currency of the bonds secured hereby, a public office or agency
75 in the city of New York for the transfer and registration of the name and post-office address of the owner or owners of the registered bonds provided for in this mortgage, and shall always keep in said office proper books for such registration, which shall, at any proper time, be made by a transfer agent of the Railroad Company on demand of the owner of any such bonds entitled to such transfer and registration presenting the same, and recording with such transfer agent his name and post-office address; and the holder of any coupon bonds secured hereby may, at any proper time, surrender the same at said office for an equivalent amount of the registered bonds of the Railroad Company; all such transfers, registrations, and exchanges of bonds to be without any charge or expense therefor to such owner or holder. Such books shall at all proper times be open to the inspection of the trustee, and to the holder or holders of not less than $500,000 of bonds, whenever requested.

Fourteenth. Whenever and as often as any contingency shall arise on which the action of the holders of bonds secured hereby shall be controlling, or in which the said bondholders have by the provisions

hereof any discretionary voice or power, the trustee hereunder may, and at the written request of the holder or holders of not less than $500,000 of such bonds, or of the railroad company, shall, call a meeting of the holders of the bonds secured hereby at the time outstanding in manner hereinafter provided; and until otherwise prescribed by said bondholders, such meetings shall be held at the city of New York, and notice of the objects, time, and place of such meeting shall be given by publishing the same in a newspaper of good circulation in the city of New York, twice a week for four successive weeks (the last publication to take place on the day in such notice men-
76 tioned for such meeting), and by depositing in the post-office in the city of New York at the time of, or previous to, the first publication of such notice a written or printed copy thereof, properly enveloped and directed, postage prepaid, to each and every registered owner or owners of any one or more of said bonds, at his or their registered address; and in case the said trustee shall fail to call such meeting in manner aforesaid within ten days after a request in writing therefor shall have been made by the holder or holders of not less than five hundred thousand dollars ($500,000) of such bonds, or by the Railroad Company, or if said trustee shall have resigned or been removed, or otherwise have become incapacitated, the president of said Railroad Company or the holder or holders of said bonds to the amount aforesaid may call such meeting in manner aforesaid; provided further, that the expense of publishing and giving such notice shall be a liability of said Railroad Company hereunder, and may be defrayed if necessary out of any trust funds in the hands of the trustee; and that nothing herein contained shall be held to require the trustee to incur any personal liability in the calling and holding of such meeting; and at any meeting a majority in interest of the holders of said bonds outstanding may prescribe and establish such rules and by-laws as they may deem proper for the calling of future similar meetings, and the regulation of proceedings thereof, and alter, repeal, or amend the same at pleasure. And it is hereby declared and agreed that at any meeting so convened the holders of said bonds shall be competent to exercise, in person or by proxy, all the powers and authorities conferred upon them by these presents, and that holders of the amount of bonds necessary for any action or requisition shall constitute a quorum for such action
77 or requisition; provided, that less than a quorum may adjourn from time to time, and that each holder of a bond or bonds shall be entitled to one vote for every $1,000 of the principal sum mentioned in his bond or bonds, and that a majority of votes represented shall govern in all cases wherein a majority in interest of all bonds outstanding is not hereby required.

And it is hereby declared and provided that at any meeting of bondholders held in pursuance of the provisions hereof, any bondholder present may require the ownership of bonds by the persons claiming to be such owners to be evidenced by the production of those bonds, excepting in the case of bonds standing registered in the name

of such holder, and that whenever, under any provisions of this indenture, effect is to be given to the election, act, appointment, requisition, or assent of a majority, or any specified amount or proportion of the bondholders secured hereby, any person whose interests are to be affected by such action may require that the ownership of such bonds by the person claiming to be such owner, excepting registered bonds as aforesaid, shall be vouched for by the affidavit of such person or his duly authorized agent or attorney having possession of the bonds, stating such ownership of the bonds, and giving their numbers, dates, and amounts; which affidavit shall be received as prima facie evidence of the fact, but subject to the question of its verity, and subject to demand for the production of the bonds in any legal proceeding or controversy.

The trustee or any bondholder attending any such meeting shall have a right to require that any act or resolution of such bondholders affecting the rights or remedies of, or for the benefit of the bondholders, or the duties of the trustee or the interests of the
78 trusts hereby created, shall be authenticated by the signature of all the persons assenting thereto, as well as by a minute of the proceedings at any such meeting.

The term majority in interest as used in this indenture shall be held to mean holders having a majority of votes on bonds issued and outstanding for the time being, according to the number of votes to which each holder is entitled as aforesaid, and not a majority of individuals.

Any request, requisition, or other instrument signed by bondholders pursuant to the provisions of this indenture shall be proved or acknowledged as deeds are proved or acknowledged for record in the States of New Jersey or New York.

Fifteenth. Certificates representing all the stock of the different companies hereby assigned by way of mortgage to the trustee, except fifty shares of the stock of each of said companies, or so many thereof as may be retained by the Railroad Company to qualify directors in each of said companies, shall, as such stock comes under the control of the Railroad Company from time to time, be forthwith transferred to and new certificates issued in the name of the Railroad Company, which certificates shall be stamped with the words "This certificate is deposited with and held by the trustee pursuant and subject to the terms of the general mortgage of the Central Railroad Company of New Jersey, dated July 1, 1887."

The Railroad Company shall duly execute a transfer endorsed on such certificates in the following form: "For the consideration set forth in the general mortgage of the Central Railroad Company of New Jersey, dated July 1, 1887, said company does hereby bargain, sell, assign, and transfer unto the trustee of said mortgage for
79 the time being, all the capital stock named in the within certificate, and does hereby constitute and appoint the trustee its true and lawful attorney irrevocable, for and in its name and stead,

but to its use to sell, assign, transfer, and set over all or any part of the said stock, and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like power; provided, however, that the powers hereby granted shall not be exercised by the trustee until after it shall have proceeded to enforce its rights, and those of the bondholders under said mortgage, by foreclosure, entry, or otherwise, according to the terms thereof."

The said certificates so transferred shall be delivered to and deposited with the trustee, but no certificate for the shares of stock represented thereby shall be issued to the trustee until after it shall have proceeded to enforce its rights and those of the bondholders under this mortgage by foreclosure, entry, or otherwise, according to the terms hereof.

The stamping of such certificates shall be entered upon the transfer book and register of each of said companies issuing the same.

The Railroad Company, its successors and assigns, until such proceedings shall have been taken, shall have the right to sell or transfer the shares of stock hereinbefore excepted from assignment to such persons as it shall deem fit, but in trust for and subject to this mortgage, to enable the persons to whom such transfers shall be made to serve as directors in the said companies, respectively, but such transfers shall be of no force and effect after such proceedings shall have been taken. The certificates of stock so sold or transferred shall be stamped as follows: "This certificate is held subject to the terms of the general mortgage of the Central Railroad Company of New Jersey, dated July 1, 1887."

80 The Railroad Company will, upon the request of the trustee, procure the execution of an agreement with the trustee by each of said companies, whereof a majority of the stock is mortgaged, that it will not hereafter authorize or execute any mortgage or incumbrance of or upon any of its property until thirty days after written notice of its intention to authorize and execute the same has been served on the Railroad Company and the trustee, and not then if written objection to such mortgage or incumbrance shall be made and served on such company by either the Railroad Company or the trustee, on the ground that such mortgage or incumbrance will impair the security of these presents.

All dividends on any of the said stocks hereby mortgaged shall belong and be paid to the Railroad Company so long as and whenever it shall be in possession of the Central Railroad of New Jersey, in conformity with the provisions of this mortgage.

No assignment of such dividends by the Railroad Company in advance of their payment shall affect the right of the trustee to receive the same after it shall have proceeded to enforce its rights and those of the bondholders under this mortgage.

There shall be no return, cancellation, or special transfer of the certificates of stock pledged by the "Adjustment mortgage" of the

Railroad Company, dated May 1, 1878, until after the satisfaction of said mortgage.

The assignment of the aforesaid shares of stock shall not prevent the consolidation and merger of any one or more of the companies, the stock of which is hereby mortgaged, with any other or others of said companies or with the Central Railroad Company of New Jersey, or the purchase of the railroad and property of any one
81 or more of said companies by the Central Railroad Company of New Jersey, but such consolidation and merger or purchase may be made under any existing or future laws, anything in this mortgage contained to the contrary notwithstanding.

Upon such consolidation and merger or purchase, the Railroad Company shall duly execute and deliver a supplemental mortgage conveying to the trustee all the railroad and other property so consolidated and merged or purchased, to be held by it under the terms hereof, with like effect as if specifically described herein, and the trustee shall, upon the request of the Railroad Company, deliver up to it all the certificates of stock of the company so consolidated and merged or the railroad of which has been purchased, which may have been deposited under this mortgage.

Sixteenth. All the bonds of this company or other companies hereby assigned by way of mortgage to the trustee, as they come under the control of the Railroad Company from time to time, shall be deposited with the trustee, stamped with the words "This bond is deposited with and held by the trustee pursuant and subject to the terms of the general mortgage of the Central Railroad Company of New Jersey, dated July 1, 1887," and shall remain in its custody and possession; yet so long as no proceedings shall have been taken by the trustee to enforce its rights and those of the bondholders under this mortgage, by foreclosure, entry, or otherwise, according to the terms hereof, the trustee, as the holder of said bonds, shall have no right, against the written objection of the Railroad Company, to do or perform any act or to make or execute any request, requisition, or other instrument which, by the terms of the mortgages securing such bonds the owners thereof shall be entitled to perform, make,
82 or execute, but all the rights of the owners of such bonds may, at the option of the Railroad Company and upon its request, remain with and be exercised by the Railroad Company, its successors and assigns, and the trustee shall at any time and from time to time, on the request of the Railroad Company, make and deliver to the Railroad Company powers of attorney or proxies authorizing and empowering the Railroad Company, its successors and assigns, to do and perform any and all lawful acts and to make or execute all lawful requests, requisitions, or other instruments which the owners of said bonds could do, perform, make, or execute if the said bonds were registered in their name and were in their custody and possession.

So long as and whenever the Railroad Company shall be in possession of the Central Railroad of New Jersey, in conformity with

the provisions of this mortgage, all coupons that may be attached to said bonds, shall, as they fall due, be delivered to the Railroad Company and any interest which may be or become due and payable thereon shall belong and be paid to it; provided however, that coupons now or hereafter in default upon the bonds of the Lehigh and Wilkesbarre Coal Company shall be held by the trustee, subject to the lien of this mortgage, until the obligor shall be ready to pay the same, when they shall be delivered to the Railroad Company for collection as in other cases.

The bonds pledged in the adjustment mortgage of the Railroad Company, dated May 1, 1878, shall not be deposited with the trustee, or stamped pursuant to the terms hereof, until after the satisfaction of said mortgage.

Seventeenth. In case the trustee shall have proceeded to enforce its rights and those of the bondholders under this mortgage,
83 by foreclosure, entry, or otherwise, according to the terms hereof, and such proceedings shall have been discontinued or abandoned, or shall have been determined adversely to the trustee, the Railroad Company shall be restored to the same position and rights which it had as to the stocks and bonds mortgaged hereby before such proceedings were taken, and the trustee shall, upon the written request of the Railroad Company, do, make, execute, acknowledge, and deliver such acts, deeds, instruments, and assurances in the law as may be reasonably advised or required to effectuate such purpose.

Eighteenth. Any or all of the bonds of this company or other companies and any or all the certificates of car trust associations hereby assigned by way of mortgage to the trustee shall, upon the request of the Railroad Company, be surrendered by the trustee for extension, payment, and cancellation, or either, according to such request, and any or all of the mortgages given to secure said bonds may be satisfied, anything herein contained to the contrary notwithstanding, provided, however, that such surrender for cancellation shall not be made in the case of any issue of bonds or certificates all of which have not been deposited with the trustee, except on proof that the security of this mortgage will not be thereby diminished or impaired; and provided further that all moneys received in payment for the bonds of other companies shall be applied in like manner as is prescribed by the twentieth article of this mortgage respecting the proceeds of any part of the mortgaged premises that may be sold.

Nineteenth. The trustee shall certify and deliver to the Railroad Company from time to time on its written request all the bonds secured by this mortgage, except an amount of bonds equal to
84 the par value of the hereinafter named bonds, stocks, and certificates at any time outstanding and not made subject to the lien of this mortgage, which bonds, stocks, and certificates are in-

tended to be either purchased from time to time and made subject to the lien of this mortgage, or to be paid off and cancelled, viz:

Name of securities.	Total par value of amount outstanding.
First mortgage bonds of the C. R. R. Co. of N. J	$5,000,000
Convertible bonds of the C. R. R. Co. of N. J	4,400,000
Consolidated bonds of the C. R. R. Co. of N. J	15,000,000
Adjustment bonds of the C. R. R. Co. of N. J	5,254,000
Convertible debenture bonds of the C. R. R. Co. of New Jersey	3,264,000
Bonds of the Newark & New York R. R. Co	600,000
Bonds of the New Jersey Southern Railway Co	1,590,600
Bonds of the Long Branch & Sea Shore R. R. Co	200,000
Bonds of the Lehigh Coal and Navigation Company	2,310,000
Stock of the New York & Long Branch R. R. Co	500,000
Stock of the South Branch R. R. Co	438,300
Stock of the West End R. R. Co	43,700
Stock of the Newark and New York R. R. Co	87,350
Certificates of the Railroad Car Trust of Philadelphia	52,800
Certificates of the New Jersey Car Trust Association (Limited)	50,000
Certificates of the Central New Jersey Car Trust	80,000
Certificates of the Guarantee Car Trust	700,000
Certificates of the Central Railroad Company of New Jersey Car Trust	823,000
Total	40,393,750

85 The general mortgage bonds so excepted from certification and delivery shall, nevertheless, be certified by the trustee and delivered to the Railroad Company from time to time upon its written request in exchange for an equal amount of any of the said bonds, stocks, and certificates as they shall be so purchased and made subject to the lien of this mortgage, or as the same shall be paid off and cancelled, or upon deposit with the trustee of moneys sufficient to pay the entire amount due thereon; provided, however, that there shall always remain unissued and uncertified an amount of said general mortgage bonds equal at par to the par value of such of said bonds, stocks, and certificates as have not been either cancelled or deposited with the trustee under the terms of this mortgage, or for the payment of which moneys have not been deposited, as aforesaid.

Twelfth. If the Railroad Company, its successors or assigns, shall at any time during the continuance of these presents desire to exchange for other property or to sell any part of the mortgaged premises, it shall be lawful for the trustee, and it is hereby authorized and directed to release such part of said mortgaged premises from the lien and operation of this mortgage, unless within thirty days after notice in writing to be given by the Railroad Company to the trustee, specifying the property intended to be exchanged or sold and the price or other consideration to be received therefor, the trustee shall serve upon the Railroad Company objections thereto in writing, on the ground that such price or other consideration is not a fair and just equivalent for the property to be exchanged or sold. In case of the service of such written objections and continued difference of opinion between the Railroad Company and the trustee as to
86 the adequacy of such price or other consideration, it shall be

lawful for them, and they are hereby authorized and empowered to appoint an impartial arbitrator or arbitrators to determine the adequacy of such price or other consideration, and in case such arbitrator or arbitrators shall determine that such price or other consideration is a fair and just equivalent for the property to be exchanged or sold, the trustee, notwithstanding such written objections, shall execute and deliver such release.

The proceeds of any sale so made shall be applied by the Railroad Company at its option to the improvement of any remaining part of the mortgaged premises or to the purchase of other property, real or personal, or to the purchase of the general mortgage bonds secured hereby, which bonds so purchased shall forthwith be cancelled, and all property so purchased, as also all property that may be acquired in exchange as aforesaid, shall be subject to all the trusts, including that of sale or exchange, hereby declared, and shall be conveyed in mortgage by the Railroad Company to the trustee to be so held.

If the Railroad Company, its successors or assigns, shall at any time during the continuance of these presents desire to lease any part or parts of the mortgaged premises, it shall be lawful for the trustee, and it is hereby authorized and directed to consent to such leases, and to join therein in such manner as to make this mortgage subject thereto, or to execute any agreements that may be necessary to that end, unless within thirty days after notice in writing to be given by the Railroad Company to the trustee, specifying the property intended to be leased, the trustee shall serve upon the Railroad Company objections thereto in writing, upon the ground that such lease will impair the security of this mortgage and the value of the
87 mortgaged premises, in which case like proceedings may be taken as in the case of objections to any proposed sale or exchange with like effect if the arbitrator or arbitrators shall determine that the proposed lease does not impair the security of this mortgage, and the value of the mortgaged premises.

If the Railroad Company, its successors or assigns, shall at any time during the continuance of these presents desire to compromise, adjust, or settle any disputed title or claim to any part of the mortgaged premises, it shall be lawful for the trustee, and it is hereby authorized and directed to release and discharge such part of the mortgaged premises from the lien of this mortgage, unless within thirty days after notice in writing to be given by the Railroad Company to the trustee, the trustee shall serve upon the Railroad Company objections thereto in writing, on the ground that such compromise, adjustment or settlement would impair the security of this mortgage, in which case like proceedings may be taken with like effect as in the case of objections to any proposed lease. Any consideration received upon such compromise, adjustment or settlement shall be applied in like manner as the consideration received upon any exchange or sale.

If the Railroad Company, its successors or assigns, shall at any time during the continuance of these presents desire to make any change in the location of any of the tracks or of any of the station

houses, or other buildings or structures upon any part of the mortgaged premises, it shall be lawful for it so to do, and the trustee, upon conveyance to it under the terms of this mortgage of such new tracks, station houses, buildings or other structures, and the premises on which the same may be erected, shall, at the request of the Broadila Company, release the former tracks, station houses,
88 buildings and other structures and the premises on which they were erected, from the lien of this mortgage, and execute and deliver any and all instruments necessary and proper to effect such purpose.

Twenty-first. This mortgage shall be a continuing lien to secure the full and final payment of all bonds to be issued from time to time as herein provided, not exceeding $50,000,000 in amount, irrespective of the date of issue, rate of interest or form of bond, or whether payable in gold coin of the United States or sterling money of Great Britain; and the certificate of the trustee, substantially in the form provided herein, on any bond issued under the corporate seal of the Railroad Company upon the security of this mortgage, shall be conclusive evidence that the lawful holder of the said bond is entitled to share in the security of this mortgage.

Twenty-second. It shall be lawful for the Railroad Company, anything herein contained to the contrary notwithstanding, to cancel any lease included under this mortgage whenever all the stock of the lessor company shall be deposited with the trustee under the terms hereof, and to agree to any modification or change in the terms of any contract or lease included herein, whenever such modification or change shall, in the opinion of its board of directors, be advantageous to its interests; and such contract or lease so modified shall be subject to this mortgage with like effect as if the change or modification had been made prior to the execution hereof.

Twenty-third. It is hereby mutually covenanted and agreed between the parties hereto, that the trustee need not take any
89 action which, by the terms of this mortgage, is made obligatory upon it in the execution of the trusts hereby created, if, in its opinion, such action will be likely to involve it in personal expense or liability, unless one or more of said bondholders shall, as often as required by the trustee, give it reasonable indemnity against the same, anything herein to the contrary notwithstanding; that the trustee, and its agents, attorneys and counsel, shall be entitled to a reasonable compensation for all services properly rendered in pursuance of the provisions of this mortgage, or in connection with the trusts hereby created, to be paid by the Railroad Company, or out of the income or proceeds of the mortgaged property; and that the trustee may resign and discharge itself of the trust hereby created, by notice in writing to the Railroad Company, to be given at least three months before such resignation shall take effect, or within such shorter time as shall be accepted by the Railroad Company as adequate.

The said trustee may be removed by a vote of the majority in interest of the holders of all the aforesaid bonds at any time outstanding voting, in person or by proxy, the said vote being had at a meeting duly held of the said bondholders, to be specially called for this purpose. In case at any time hereafter the said trustee, or any trustee hereafter appointed, shall resign, or be removed as herein provided, or by a court of competent jurisdiction, or otherwise, or shall become incapable or unfit to act in the said trust, a successor or successors to such trustee shall be appointed by the holders for the time being of a majority in amount of the said bonds then outstanding by instrument in writing signed and proved as herein provided, or by the vote of a meeting duly held of the holders of the said bonds. Provided, nevertheless, and it is hereby agreed and
90 declared, that in case it shall at any time hereafter prove impracticable, after reasonable exertions, to appoint in the manner hereinbefore provided a successor in the event of a vacancy which may have happened in said trust, application in behalf of all the holders of the bonds secured hereby may be made, by the holders of one-eighth of the aggregate amount of bonds outstanding, to any court of competent jurisdiction in which any part of the aforesaid property may be situated, for the appointment of a new trustee.

The trustee so appointed shall thereupon become vested with all the estate, property, rights, powers, and trusts granted to or conferred upon the party of the second part by these presents, and all the rights and powers requisite to enable it to execute the purposes of this trust, without any further assurance or conveyance, and with like effect as if named as trustee herein, and the trustee so resigning, or being removed, shall, on the written request of the new trustee who may be appointed, immediately execute a deed or deeds of conveyance to vest in such new trustee, upon the trusts herein expressed, all the property, privileges, rights, and franchises which may at that time be held upon the said trusts.

Twenty-fourth. The Railroad Company shall and will at any time, upon the request of the trustee, do, make, execute, acknowledge, and deliver all such further acts, deeds, and assurances in the law as may reasonably be advised or required for effectuating the intention of this mortgage, and for the better assuring and confirming unto the trustee and its successors in the trust hereby created, upon the trusts and for the purposes herein expressed, all and singular the railroads, equipment, and other property, rights and franchises hereby
91 conveyed or intended so to be, whether now owned or possessed, or hereafter acquired by the Railroad Company; and shall and will deliver to the trustee certificates representing all the stock of the different companies, stock of which is included in this mortgage, which may from time to time hereafter be acquired and owned by it, to be held by the trustee under the terms hereof; and shall and will execute and deliver with these presents, and from time to time hereafter when occasion shall require, and when requested by the trustee, such bills of sale and transfers, and other documents, in due form of law, as may be necessary and proper under the laws of

the United States, to vest in the trustee all and every of the tugboats, ferryboats, floats, barges, and other floating equipment hereby mortgaged, or intended so to be, to the end that the title of said party of the second part may be duly registered and recorded according to the laws of the United States.

Twenty-fifth. The word "trustee," as used in this mortgage, shall be held and construed to mean the trustee, party of the second part, or its successor or successors for the time being, and such successor or successors shall be vested with, and be entitled to exercise, all the estate, property, rights, powers, and trusts hereby granted to or conferred upon the party hereto of the second part.

Twenty-sixth. Upon payment of the principal and interest of all the general mortgage bonds secured hereby or upon deposit with or to the satisfaction of the trustee of the entire amount of such principal and interest remaining due, the trustee shall forthwith enter satisfaction of this mortgage upon the records, and transfer and deliver up all bonds and stocks deposited with it pursuant to
92 the terms hereof, and shall do, make, execute, and deliver such deeds, acts, instruments, or assurances as may, in the opinion of the counsel of the Railroad Company, be necessary to vest all the mortgaged premises and property in the Railroad Company as of its former estate therein.

In witness whereof, the said The Central Railroad Company of New Jersey has caused to be hereunto affixed its common or corporate seal, and the president of said company, by virtue of the authority vested in him, has hereunto affixed his signature, and the Secretary of the said company has duly attested the execution hereof in duplicate, this the day and year first above written.

[Seal C. R. R. Co. of N. J.]

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
By J. ROGERS MAXWELL, *President.*

Attest:

SAM'L KNOX, *Secretary.*

Signed, sealed, and delivered in the presence of—

ALEX. T. MCGILL, Jr.,
JOHN L. CONOVER.

93 The Central Trust Company of New York, trustee named in the foregoing mortgage or deed of trust, do hereby accept the trusts therein contained, and do hereby covenant and agree to perform the same.

In witness whereof, the said company has caused its corporate seal to be hereunto affixed, duly attested, the day and year in said mortgage first written.

[Seal C. T. Co. of N. Y.]

THE CENTRAL TRUST COMPANY OF NEW YORK,
By G. SHERMAN, *Vice-President.*

Attest:

C. H. P. BABCOCK, *Secretary.*

94 STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered, that on this seventeenth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, before me, Alexander T. McGill, junior, chancellor of the State of New Jersey, personally appeared Samuel Knox, of full age, who being by me duly sworn according to law, on his oath, saith: That he is secretary of the Central Railroad Company of New Jersey; that J. Rogers Maxwell is president of the same; that the seal affixed to the foregoing mortgage is the common seal of the company, and that the said J. Rogers Maxwell, by authority of a resolution of the board of directors of said company as such president, signed said mortgage and affixed said seal thereto, and delivered the said mortgage as the voluntary act and deed of the said corporation for the uses and purposes therein expressed, and that he, the said Samuel Knox, did at the execution thereof witness and attest the same and subscribe his name as a witness thereto.

SAM'L KNOX.

Sworn and subscribed at Jersey City, New Jersey, before me, the date aforesaid, which to me is satisfactory proof of the due execution of said mortgage.

ALEX. T. McGILL, Jr.,
Chancellor of the State of New Jersey.

95 STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered, that on this seventeenth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, before me, George W. Cassedy, a commissioner of the State of Pennsylvania, duly appointed and qualified according to the laws thereof to take acknowledgments, etc., to be used and recorded therein, personally appeared the above-named J. Rogers Maxwell, president of the above-named corporation, who, being duly sworn according to law, on his oath, saith: That he was personally present at the execution of the above-written instrument, and saw the common seal of the said The Central Railroad Company of New Jersey duly affixed thereto; that the seal so affixed is the common seal of the said The Central Railroad Company of New Jersey; that the above-written mortgage was duly sealed and delivered by him, as and for the act and deed of the said corporation of The Central Railroad Company of New Jersey, for the uses and purposes therein mentioned, and that the name of this deponent, subscribed to said mortgage as the president of said corporation, in attestation of the due execution and delivery of said mortgage, is of this deponent's proper handwriting.

J. ROGERS MAXWELL.

Sworn and subscribed to before me at Jersey City, New Jersey, the day and year aforesaid.

In witness whereof I have hereto set my hand and official seal.

[Commissioner's seal.] GEO. W. CASSEDY,
Commissioner for Pennsylvania in New Jersey.

96 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered, that on this seventeenth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, before me personally came Samuel Knox, secretary of the Central Railroad Company of New Jersey, with whom I am personally acquainted, who being duly sworn according to law, saith: That he resides in the city of Elizabeth, New Jersey; that he was at the date of the foregoing mortgage, and is now, secretary of the Central Railroad Company of New Jersey; that he knows the common seal of said Railroad Company; that the seal affixed to the above mortgage is the common seal of said Railroad Company; that the seal affixed to the above mortgage was so affixed by order of the board of directors of said Railroad Company; that he signed his name thereto as secretary by the like order of said board of directors; that he is well acquainted with J. Rogers Maxwell, and knows him to be the president of said Railroad Company; that the signature of said J. Rogers Maxwell subscribed to said mortgage is in the genuine handwriting of said J. Rogers Maxwell, and was thereto subscribed by order of the board of directors of said Railroad Company, in his presence.

SAM'L KNOX.

Sworn and subscribed before me, at the city of New York, the day and year aforesaid.

In witness whereof I have hereto set my hand and official seal.

[Notarial seal.] ARCHIBALD C. WEEKS,
Notary Public, Kings County.

Certificate filed in New York County.

97 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered, that on this 17th day of September, in the year of our Lord one thousand eight hundred and eighty-seven, before me, a master of the Court of Chancery of the State of New Jersey, personally appeared C. H. P. Babcock, of full age, who, being by me duly sworn according to law, on his oath, saith: That he is secretary of the Central Trust Company; that George Sherman is vice-president of the same; that the seal affixed to the foregoing acceptance of trust is the common seal of the company, and that the said George Sherman, as such vice-president, signed said acceptance of trust and affixed said seal thereto, and delivered the same as the voluntary act and deed of the said corporation for the uses and purposes therein

expressed, and that he, the said C. H. P. Babcock, did at the execution thereof witness and attest the same and subscribe his name as a witness thereto.

C. H. P. BABCOCK.

Sworn and subscribed at the city of New York, before me, the date aforesaid, which to me is satisfactory proof of the due execution of said acceptance of trust.

JOHN L. CONOVER,
Master in Chancery of New Jersey.

98 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered, that on this seventeenth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, before me, Charles Edgar Mills, a commissioner of the State of Pennsylvania, duly appointed and qualified according to the laws thereof to take acknowledgments, etc., to be used and recorded therein, personally appeared the above-named George Sherman, vice-president of the above-named corporation, who, being duly sworn according to law, on his oath, saith: That he was personally present at the execution of the above-written instrument, and saw the common seal of the said The Central Trust Company duly affixed thereto; that the seal so affixed is the common seal of the said The Central Trust Company; that the above-written acceptance of trust was duly sealed and delivered by him, as and for the act and deed of the said corporation of The Central Trust Company, for the uses and purposes therein mentioned, and that the name of this deponent, subscribed to said mortgage as the vice-president of said corporation, in attestation of the due execution and delivery of said acceptance of trust, is of this deponent's proper handwriting.

G. SHERMAN.

Sworn and subscribed to before me at New York City, New York, the day and year aforesaid.

In witness whereof I have hereto set my hand and official seal.

[Commissioner's seal.] CHARLES EDGAR MILLS,
Commissioner for Pennsylvania in New York.

99 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered, that on this seventeenth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, before me personally came C. H. P. Babcock, secretary of the Central Trust Company, with whom I am personally acquainted, who, being duly sworn according to law, saith: That he resides in the city of New York; that he was, at the date of the foregoing acceptance of trust, and is now, secretary of the Central Trust Company; that he knows the common seal of said Trust Company; that the seal affixed to the above acceptance of trust is the common seal of said Trust Company; that he is well acquainted with George Sherman, and

knows him to be the vice-president of said Trust Company; that the signature of said George Sherman subscribed to said acceptance of trust is in the genuine handwriting of said George Sherman and was thereto subscribed in his presence.

C. H. P. BABCOCK.

Sworn and subscribed before me, at the city of New York, the day and year aforesaid.

In witness whereof I have hereto set my hand and official seal.

ARCHIBALD C. WEEKS, [Notarial seal.]
Notary Public, Kings County.

Certificate filed in New York County.

100 Recorded in the office of the register of the city and county of New York, in liber 2223 of mortgages, page 50, on the 28 day of Sept., A. D. 1887, at 3 o'clock p. m. Min.

Witness my hand and official seal.

[SEAL.] JAMES J. SLEVIN, *Register.*

Received in the office of the register of the county of Hudson, N. J., at 12 o'clk., Sept. 19, 1887, a. m., and recorded in book 200 of mortgages for said county on page 223, &c.

[SEAL.] GEO. B. FIELDER, *Register.*

Received in the office of the register of the county of Essex, N. J., on the 19th day of September, A. D. 1887, at 4 o'clock p. m., and recorded in book G 9 of mortgages for said county on pages 567, &c.

[SEAL.] EMIL TOERING, *Register.*

Received in the clerk's office of the county of Union, N. J., on the 20 day of Sept., A. D. 1887, at 11.30 o'clock in the forenoon, and recorded in book 76 of mortgages for said county on pages 1 to 61.

[SEAL.] JNO. L. CROWELL, *Clerk.*

Received in Middlesex County clerk's office on the 20th day of September, A. D. 1887, at 3.45 p. m., and recorded in book 102 of mortgages, pages 7, &c.

[SEAL.] C. M. SLACK, *Clk.*

101 Received in Somerset County clerk's office on the 21st day of September, A. D. 1887, and recorded in book F No. 3 of mortgages for said county, on pages 149, &c.

[SEAL.] WM. A. SCHOMP, *Clerk.*

Received in the clerk's office of the county of Hunterdon, N. J., on the 21st day of September, A. D. 1887, at 3.45 p. m., and recorded in vol. 65 of mortgages for said county, on page 33, &c.

[SEAL.] PETER VOORHEES, *Clerk.*

Received in Warren County clerk's office on the 22d day of September, A. D. 1887, and recorded in book of mortgages, vol. 48, page one, &c., for said county.

[SEAL.] THEO. P. HOPLER, *Clk.*

Received in the office of the secretary of state of the State of New Jersey, on the twenty-second day of September, A. D. 1887, at 3 o'clock p. m., and recorded in book G of corporations, page 82, &c.

[SEAL.] HENRY C. KELSEY, *Secretary of State.*

Received September 22, 1887, at six o'clock p. m., and recorded in Monmouth County clerk's office at Freehold, N. J., in book 125 of mortgages for said county, on page 223.

[SEAL.] JAMES H. PATTERSON, *Clk.*

102 Received in the clerk's office of the county of Morris, New Jersey, on the 23d day of September, A. D. 1887, and recorded in book A 4 of mortgages for said county, on pages 475, &c.

[SEAL.] MELVIN S. CONDIT, *Clerk.*

Received in the clerk's office of the county of Sussex, New Jersey, on the 23d day of September, A. D. 1887, at 3.20 o'clock p. m., and recorded in book H 3 of mortgages, on page 1, &c.

[SEAL.] JOHN H. WELDEN, *Clerk.*

LACKAWANNA COUNTY, *ss:*

Recorded in the office for recording deeds, &c., in and for said county, in mortgage book number 18, page 353, &c.

Witness my hand and seal of office this 24th day of September, 1887.

[SEAL.] ELIEZER D. JENKINS, *Recorder.*

LUZERNE COUNTY, *ss:*

Rec'd in the recorder's office in and for said county, at 5.25 p. m., this 24th September, 1887, recorded in mortgage book No. 54, page 269, &c.

In testimony whereof I have hereunto set my hand and affixed the seal of the said recorder's office the day and year above written.

[SEAL.] JOS. J. MCGUITY, *Recorder.*

103 STATE OF PENNSYLVANIA,

Carbon County, ss:

Recorded in the office for recording of deeds at Mauch Chunk, in and for the said county and State, in mortgage book No. 14, page 12.

Witness my hand and seal of office this 24th day of September, 1887.

[SEAL.] JAMES H. HANDWERK,
Recorder of Deeds, &c.

STATE OF PENNSYLVANIA,

County of Schuylkill, ss:

Recorded on this 26th day of Sept., A. D. 1887, in the office of the recorder of deeds in and for said county, in mortgage book No. 4 O, page 348, &c.

Witness my hand and seal of office the day and year aforesaid.

[SEAL.] A. J. SHORTALL, *Recorder.*

LEHIGH COUNTY, *ss:*

Recorded in the office for the recording of deeds, &c., in and for said county, in mortgage book, volume No. 44, page 1, &c.

Witness my hand and seal of office this 27th day of Sept., anno Domini 1887, at 8 a. m.

[SEAL.] HENRY J. GACKENBACH, *Recorder.*

Recorded in recorder's office, Easton, Pa., September 27, 1887, at 11.25 a. m., in mortgage book No. 57, page 334, &c.

Witness my hand & seal.

[SEAL.] GEO. R. HESS, *Recorder.*

104 September 27, 1887, received in Ocean County clerk's office at Tom's River, at five-thirty o'clock p. m., and recorded in book No. 43 of mortgages, page 148.

[SEAL.] WM. I. JAMES, *Clerk.*

Received October 3rd, 1887, at 10.35 a. m., and recorded in the clerk's office of the county of Burlington at Mount Holly, N. J., in book K 3 of mortgages, folio 570.

[SEAL.] LEVI FRENCH, *Clerk.*

Received October 3rd, 1887, at 2.10 p. m., and recorded in the register of deeds office of Camden County at Camden, New Jersey, in mortgage book No. 43, p. 301, &c.

[SEAL.] ROBERT F. S. HEATH, *Register.*

Received October 3rd, 1887, and recorded in the clerk's office of Gloucester County at Woodbury, in book A3 of mortgages, page 210.

[SEAL.] H. C. LOUDENSLAGER, *Clerk,*
Per B.

Received Oct. 4, 1887, and recorded in Salem County clerk's office, in book No. 9 of mortgages, folio 383, &c.

[SEAL.] C. D. COLE, *Clerk.*

105 STATE OF NEW JERSEY,
Cumberland County, ss:

Received October 4, 1887, and recorded in the clerk's office of the county of Cumberland, and recorded in book No. 40 of mortgages, folio 264, &c.

[SEAL.] F. S. GODFREY, *Clerk.*

STATE OF NEW JERSEY,
Atlantic County, ss:

Received Oct. 6, 1887, and recorded in the clerk's office of the county of Atlantic, and recorded in book No. 20 of mortgages, folio 194.

[SEAL.] LEWIS EVANS, *Clerk.*

107–108–109 *Agreement between the Lehigh Coal and Navigation Co. and the Central Railroad Company of New Jersey, dated June 28, 1887.*

110–111 This indenture, made the twenty-eighth day of June, A. D. 1887, between the Lehigh Coal and Navigation Com-

pany of the first part, and the Central Railroad Company of New Jersey, of the second part.

Whereas by deed bearing date March 31, 1871, a copy of which is hereto annexed marked "Exhibit A," a contract was made between the parties to this indenture, among other things, for the lease of the Lehigh and Susquehanna Railroad and branches to the parties of the second part and for the working of the said railroad by the party of the second part in connection with its railroad in the State of New Jersey; and

Whereas the party of the second part in the year 1883, desiring to transfer that contract to the Philadelphia and Reading Railroad Company, a deed bearing date May 29, 1883, a copy of which is hereto annexed marked "Exhibit B," was executed between the parties to this indenture and the Philadelphia and Reading Railroad Company, by which deed the contract and lease then subsisting under the deed of March 31, 1871, was converted into a contract and lease defined by the provisions of the deed of March 31, 1871, as the same were modified by the deed of May 29, 1883, and thereupon by another deed of the same date the contract and lease were transferred by the Central Railroad Company of New Jersey to the Philadelphia and Reading Railroad Company; and

112 Whereas on the first day of January, 1887, the parties of the second part under and by virtue of proceedings in the Circuit Court of the United States took possession of the Lehigh and Susquehanna Railroad and branches, and assumed the control and management of the said railroad and of the property which prior to that time had been held by the Philadelphia and Reading Railroad Company under the contract of March 31, 1871, as modified by that of May 29, 1883; and

Whereas proceedings have been commenced in the Circuit Court of the United States for the Eastern District of Pennsylvania, to declare that the right of the party of the second part to the said contracts and to the lease and control of the Lehigh and Susquehanna Railroad and branches, has ceased and determined; and alternatively to ascertain and declare the terms of the lease and contract under which the said railroad is and shall be held and managed; and

Whereas it is deemed advantageous to both the parties to this indenture that the Lehigh and Susquehanna Railroad and branches should be controlled and worked by the Central Railroad Company of New Jersey, in connection with its railroad from Phillipsburg to tidewater, if the terms and conditions of the contract under which the same is to be done are satisfactory to both parties, and if they can agree on the same:

It is therefore mutually covenanted and agreed, that on and after January 1, 1887, the contract, grant, or agreement by which the Central Railroad Company of New Jersey holds, or claims or can

113 hold or claim any right to the Lehigh and Susquehanna Railroad, or to the control or management of the same, or to any property described in or to any rights created or granted by the deed

of March 31, 1871, or by the deed of May 29, 1883, is set forth and contained in and is defined by the two written instruments above mentioned; and that the terms, conditions, covenants, and agreements of every kind set forth or contained in the deed of May 29, 1883, wherever the same differ from the terms, conditions, covenants, and agreements set forth and contained in the deed of March 31, 1871, shall be taken as the terms, conditions, covenants, and agreements of the contract and lease between the parties to this indenture subsisting on and after January 1, 1887. And all covenants or agreements which by the deed of May 29, 1883, were made on the part of the Philadelphia and Reading Railroad Company, are to be deemed to have been made by and to be performable by the Central Railroad Company of New Jersey, and all conditions, duties, or obligations assumed by the Philadelphia and Reading Railroad Company or imposed on their estate or property, and all rights accruing to that company by the deed of May 29, 1883, are to be deemed to be assumed by and to accrue to the Central Railroad Company of New Jersey, and to be imposed on their estate and right in the premises, contract, and property derived from the Lehigh Coal and Navigation Company; and all rights conferred on the Lehigh Coal and Navigation Company, and all duties and obligations accruing to them, and all conditions and obligations imposed on them, are to be deemed and taken to be as they are defined in the deed of May 29, 1883, when the terms of that instrument differ from those of the deed of March 31, 1871, excepting only that such of the provisions of the third covenant of the deed of May 29, 1883, as relate to the development of the Lehigh and Wilkesbarre Coal Company's lands, and to the mode of com-
114 pensation for a deficiency in the stipulated production of those lands, and to the causing of the production of the said lands to pass to or toward its market over the lines of the Lehigh and Susquehanna Railroad and branches, shall be so modified as to read as follows:

"will cause the development of the anthracite lands that may be owned, leased, or controlled by the Lehigh and Wilkesbarre Coal Company and the Central Railroad Company of New Jersey to proceed pari passu with the general development of the anthracite region of Pennsylvania, and in such manner that the said lands shall produce at least six per cent of the total production of the anthracite region in each year till the year ending December 31, 1896, and thereafter shall produce in each year at least five and one-half per cent of the total production of the anthracite region so long as it shall be possible for them to produce at that rate.

"If the Central Railroad Company of New Jersey and the Lehigh Coal and Navigation Company should differ as to the possibility of maintaining the production of the said lands at the stipulated amount, the question of possibility shall be referred to arbitrators, one to be appointed by the Lehigh Coal and Navigation Company and one by the Central Railroad Company of New Jersey, and the two thus

chosen shall select a third, and their decision, or that of a majority of them, shall be final and conclusive and binding on the parties hereto.

"If in any year prior to the time at which the Central Railroad Company of New Jersey shall be entitled to claim that the anthracite lands aforesaid can no longer produce anthracite in the stipulated ratio, the production of the said lands shall fall below the
115 stipulated amount, the Central Railroad Company of New Jersey shall and will use all means that shall be reasonably possible to make up the deficiency in the production of that year by a corresponding excess of production in the next year over the stipulated production for the said next year; and if the said deficiency of production of the preceding year shall not be so compensated, then the Central Railroad Company of New Jersey shall and will pay to the Lehigh Coal and Navigation Company the sum of money which the Lehigh Coal and Navigation Company would have received from the business of the said preceding year if the guaranteed production of the anthracite lands aforesaid had been made; excepting only that if in any such year in which the Central Railroad Company of New Jersey shall be bound as aforesaid to make up the deficiency of production of the preceding year, the failure to produce sufficient anthracite to make up such deficiency from the anthracite lands aforesaid shall have been caused by the occurrence in such year or in the preceding year of a general strike of workmen, or an extensive fire in the collieries, or an extensive flooding of the collieries, and not by the inability of the collieries to produce the required amount of coal under ordinary circumstances, the Central Railroad Company of New Jersey shall for those years be relieved of its obligation to pay to the Lehigh Coal and Navigation Company the sum of money which the Lehigh Coal and Navigation Company would have received from the business of the said years if the guaranteed production of anthracite had been made; and the Central Railroad Company of New Jersey shall and will cause the production of the anthracite lands aforesaid to pass over the lines of the Lehigh and Susquehanna Railroad
116 and branches to markets that can be reached by way of the said railroad lines, and as far as it can be carried toward such markets over said lines, from which lines it shall not be diverted except for an equivalent that shall be satisfactory to the Lehigh Coal and Navigation Company, and that shall have been accepted by them in writing before such diversion shall be made, the Lehigh Coal and Navigation Company agreeing on its part to consent to such diversion when it shall clearly appear that the interests of the Lehigh and Susquehanna Railroad and branches will be thereby promoted," and

Whereas it is important for the interests of both the parties hereto (as tending to secure enough business for the Lehigh and Susquehanna Railroad and branches to enable the Central Railroad Company of New Jersey to earn sufficient revenues on the Lehigh and Susquehanna Railroad and branches to pay the stipulated rental) that so much as possible of the coal product of the Lehigh Coal and

Navigation Company's lands shall be sent to market over the lines of the Lehigh and Susquehanna Railroad and branches and the Central Railroad of New Jersey, it is agreed between the parties hereto that the proviso in the first of the covenants of the party of the first part in the agreement of March 31, 1871, shall be changed so as to read as follows:

"Provided that one-fourth and no more of the coal to be mined annually by the Lehigh Coal and Navigation Company from lands owned, leased, or controlled by it may be sent to market over railroad lines other than the Lehigh and Susquehanna Railroad and branches in case that by so doing the Lehigh Coal and Navigation Company can realize a larger price or profit than it might have realized
117 from the price at the mines together with its proportion of the freight earnings on such coal on the Lehigh and Susquehanna Railroad and branches if it had been shipped over that railroad; but the Central Railroad Company of New Jersey shall have the option in such cases of buying such coal of the Lehigh Coal and Navigation Company at its mines, paying therefor a price which added to the proportion of the freight earnings on such coal accruing to the Lehigh Coal and Navigation Company shall not be less than that which the Lehigh Coal and Navigation Company would have realized if its coal had been shipped over other lines of railroad. But nothing in this proviso shall be held to limit the shipment of coal by the Lehigh Coal and Navigation Company over the Lehigh and Hudson River Railway to points in the interior of New England, except that the amount of coal shipped by the Lehigh Coal and Navigation Company over the Lehigh and Hudson River Valley Railway, added to the amount that may be sent to market by railroad lines other than the Lehigh and Susquehanna Railroad and branches, shall not in any year exceed twenty-five per cent of the total production of its mines," and

Whereas it is important for the interests of both the parties hereto as tending to the development of the business of the Lehigh and Susquehanna Railroad and branches that an independent connection with the city of Scranton and with the railroads centering there should be secured for the said railroad, it is agreed between the parties hereto that the Lehigh Coal and Navigation Company shall assign to the Central Railroad Company of New Jersey the contract with the Delaware and Hudson Canal Company of January 27, 1887, a copy of which is hereto annexed marked "Exhibit C," under
118 which it has the right to the unrestricted use of the Delaware and Hudson Canal Company's railroad between Union Junction and Minooka Junction, and shall procure a lease to the Central Railroad Company of New Jersey of the railroad which the Wilkesbarre and Scranton Railway Company is building from Minooka Junction to Scranton; and that the Central Railroad Company of New Jersey shall assume all the duties to the Delaware and Hudson Canal Company which under the said agreement of January 27, 1887, were assumed by the Lehigh Coal and Navigation Company, and shall lease the railroad of the Wilkesbarre and Scranton Railway

Company upon terms which shall be generally similar to those of the existing lease of the Lehigh and Susquehanna Railroad and branches, except that the annual rental shall be fixed at the rate of six per cent on the cost of the Wilkesbarre and Scranton Railway as the same shall from time to time appear on the books of the said Railway Company, the Central Railroad Company of New Jersey assuming and paying all taxes that may by any lawful authority be assessed on the property of the Wilkesbarre and Scranton Railway Company, and on the rent or revenue derived by the Lehigh Coal and Navigation Company from said lease, so that the Lehigh Coal and Navigation Company shall receive the rent of six per cent on the cost of the Wilkesbarre and Scranton Railway free of all charges whatever; the lease of the Wilkesbarre and Scranton Railway and the assignment of the contract with the Delaware and Hudson Canal Company being terminable by the party of the first part whenever the lease of the Lehigh and Susquehanna Railroad and branches shall terminate; and that the Central Railroad Company of New Jersey shall operate in connection with the Lehigh and Susquehanna Railroad, the aforesaid roads connecting the Lehigh and Susque-
119 hanna Railroad with the city of Scranton and with the railroads centering there; and

Whereas it has been the purpose of the agreements heretofore made between the parties hereto, as is plainly declared in the deed of March 31, 1871, and elsewhere, that for the public convenience and accommodation and for the interest of the parties hereto, the railroads of the parties hereto, forming a continuous line of railroad from the Wyoming and Lehigh coal fields of Pennsylvania to the waters of the Hudson River at Jersey City, should be worked as one line and under one direction, it is agreed between the parties hereto that if at any time it shall be necessary for the purpose of maintaining the continuity of the said line of railroad and the unity of its management that the Lehigh and Susquehanna Railroad and branches should be operated by the Lehigh Coal and Navigation Company, then the Central Railroad Company of New Jersey shall and will request the Lehigh Coal and Navigation Company to operate the Lehigh and Susquehanna Railroad and branches and the Lehigh Coal and Navigation Company shall accede to the request and shall operate the Lehigh and Susquehanna Railroad and branches for the account of the Central Railroad Company of New Jersey and at its charge and risk so long as it may remain necessary so to do in order to carry out the purpose of the existing agreements. In that event the Central Railroad Company of New Jersey shall furnish the equipment required, and shall in all other respects carry out the provisions of this agreement and of the deeds of March 31, 1871, and of May 29, 1883, the only change contemplated in the duties of the Central Railroad Company of New Jersey being that in the operation of the Lehigh and Susquehanna Railroad and branches it
120 shall act through the Lehigh Coal and Navigation Company instead of through its own officers. And it is further agreed

that when in the opinion of the Central Railroad Company of New Jersey there shall be no longer any necessity for the purposes hereinbefore set forth that the Lehigh Coal and Navigation Company shall continue to operate the Lehigh and Susquehanna Railroad and branches, then the Lehigh Coal and Navigation Company shall surrender to the Central Railroad Company of New Jersey possession of the Lehigh and Susquehanna Railroad and branches and of the equipment belonging to the Central Railroad Company of New Jersey, and the Central Railroad Company of New Jersey shall assume and shall continue the operation of the Lehigh and Susquehanna Railroad and branches under the deeds of March 31, 1871, and of May 29, 1883, and this agreement.

The parties hereto respectively agree that the Central Railroad Company of New Jersey shall and will on or before the first day of January, 1888, deposit with the Fidelity Insurance Trust and Safe Deposit Company of Philadelphia two millions three hundred and ten thousand dollars of the five per cent bonds to be secured by the proposed general mortgage of the Central Railroad Company of New Jersey, and that these bonds shall be pledged for the payment at maturity of two millions three hundred and ten thousand dollars of the gold loan of the Lehigh Coal and Navigation Company falling due December 15, 1897, the payment of the principal and interest on which amount was assumed by the Central Railroad Company of New Jersey in the second of the covenants of the party of the second part in the agreement of March 31, 1871, these bonds being an additional security to that of the equipment which by the agree-
121 ment just recited is charged with the payment of the above recited sum; and this being done, that the Lehigh Coal and Navigation Company shall and will on or before the first day of March, 1888, pay to the Central Railroad Company of New Jersey, in cash, such sum as may then stand to the credit of the Central Railroad Company of New Jersey on the books of the Lehigh Coal and Navigation Company for expenditures made on the Lehigh and Susquehanna Railroad and branches under the provisions of the first of the mutual covenants of the agreement of March 31, 1871, and the Lehigh Coal and Navigation Company shall and will thereafter pay the Central Railroad Company of New Jersey in cash for all expenditures that may be made under the provisions of the first of the mutual covenants of the agreement of March 31, 1871, as aforesaid, within twelve months from the end of the year in which such expenditures shall have been made; provided, that the Central Railroad Company of New Jersey shall not, at the time when such payments may become due, be in default under the provisions of the agreement of March 31, 1871, or of the agreement of May 29, 1883, or of this agreement.

The parties hereto agree that in case of any breach of covenant or contract by the Central Railroad Company of New Jersey, if the same shall not be fully compensated within a reasonable time, the party of the first part may at its option declare the deed of March 31,

1871, and the deed of May 29, 1883, and this agreement to be determined, and may exercise all the remedies for enforcing its rights and for the possession of the demised property as the same are conferred by the deed of May 29, 1883.

The parties hereto agree that if any one claiming under the Central Railroad Company of New Jersey, by virtue of any mort-
122 gage or prior grant or agreement, shall at any time set up or pretend that he is entitled to any property or contract or to any benefit or interest in any property which is the subject of the deed of March 31, 1871, or of the deed of May 29, 1883, or of this agreement, but is not bound by the covenants in the deed of May 29, 1883, or by the terms of this agreement, nothing herein contained or which may be done under this agreement shall in any manner affect the right of the Lehigh Coal and Navigation Company to set up any matters in avoidance of that claim which it might do if this deed had never been executed nor the possession and control of the Lehigh and Susquehanna Railroad and branches enjoyed by the Central Railroad Company of New Jersey or acquiesced in by the Lehigh Coal and Navigation Company after January 1, 1887.

And the parties hereto agree that in case of any difference of opinion between them in relation to any of the provisions of this agreement which may be proper subjects of arbitration, the matters in dispute shall be referred to arbitrators, one to be appointed by the Lehigh Coal and Navigation Company and one by the Central Railroad Company of New Jersey, and the two thus chosen shall select a third, and their decision or that of the majority of them, shall be final and conclusive.

This agreement shall be binding upon the parties hereto during the continuance of the estate granted and the contract made by the deeds of March 31, 1871, and of May 29, 1883, and shall, together with the said deeds, constitute one contract between the Lehigh Coal and Navigation Company and the Central Railroad Company of New Jersey, but all the rights and duties created by this agreement or under its provisions shall absolutely cease and determine whenever those
123 deeds shall cease and determine for any consideration, whether by limitation or on account of the act or omission of the Central Railroad Company of New Jersey.

In witness whereof, the parties hereto have caused their corporate seals, duly attested, to be hereunto affixed, the day and year first above written.

By order of the board of managers of the Lehigh Coal & Navigation Co.

J. S. HARRIS, *President.*

Attest:
[Seal L. C. & N. Co.] S. SHEPHERD, *Secretary.*

THE CENTRAL R. R. CO. OF NEW JERSEY,
J. R. MAXWELL, *Pt.*

Attest:
[Seal C. R. R. Co. of N. J.] SAML. KNOX, *Sec'y.*

124 STATE OF PENNSYLVANIA,
City of Philadelphia, ss:

Be it remembered that on this thirteenth day of July, A. D. one thousand eight hundred and eighty-seven, before me, the subscriber, a notary public in and for said city, personally came and appeared S. Shepherd, esquire, secretary of the foregoing named corporation, the Lehigh Coal and Navigation Company, who, being duly sworn according to law, deposes and says, that he was personally present at the execution of the foregoing indenture, and saw Joseph S. Harris, esquire, president of the said corporation, affix the seal of the said company to the said indenture, and deliver the same as the act and deed of the said company; and that the name of this deponent subscribed to the said indenture, as secretary of the said corporation, in attestation of the due execution and delivery of said indenture, is of this deponent's own proper handwriting.

S. SHEPHERD.

Sworn to and subscribed before me, this the day and year first aforesaid, at Philadelphia.

Witness my hand and seal.

[Notarial seal.] WM. C. ALDERSON,
Notary Public.

125 STATE OF NEW YORK,
City and County of New York, ss.:

Be it remembered, that on this eleventh day of July, A. D. one thousand eight hundred and eighty-seven, before me, the subscriber, a commissioner for the State of Pennsylvania, resident in the State of New York, duly authorized to take the acknowledgment and proof of deeds, personally came and appeared Samuel Knox, esquire, secretary of the foregoing named corporation, the Central Railroad Company of New Jersey, who, being duly sworn according to law, deposes and says that he was personally present at the execution of the foregoing indenture, and saw J. Rogers Maxwell, esquire, president of the said corporation, affix the seal of the said company to the said indenture and deliver the same as the act and deed of the said company; and that the name of this deponent subscribed to the said indenture, as secretary of the said corporation, in attestation of the due execution and delivery of said indenture, is of this deponent's own proper handwriting.

SAML. KNOX.

Sworn to and subscribed before me, this the day and year aforesaid, at New York.

Witness my hand and seal.

[Commissioner's seal.] CHARLES EDGAR MILLS,
A Commissioner for Pennsylvania, in New York,
No. 115 Broadway, N. Y. City.

126 "Exhibit A."

Articles of agreement, made this thirty-first day of March, A. D. 1871, between the Lehigh Coal and Navigation Company, a corpora-

tion created by and existing under the laws of Pennsylvania, parties of the first part; and the Central Railroad Company of New Jersey, a corporation created by and existing under the laws of the State of New Jersey, parties of the second part.

Whereas the parties of the first part are the owners of a railroad extending from a point at or near Wilkesbarre, in the State of Pennsylvania, to a point at or near Phillipsburg, in the State of New Jersey, having various branches within the said State, which are hereinafter mentioned, and the parties of the second part are the owners of a railroad beginning at the terminus of the said railroad of the parties of the first part at Phillipsburg aforesaid and extending in the State of New Jersey to a point on the Hudson River, at Jersey City, and the said roads so connected from a continuous line of railroad from the Wyoming and Lehigh coal fields of Pennsylvania, to the Hudson River aforesaid, and it is deemed desirable for the public convenience and accommodation, and for the interest of the parties hereto, that the said railroads should be worked as one line and under one direction.

And whereas the parties of the first part are willing to contract for the working of their said railroad and the branches thereof hereinafter mentioned by the parties of the second part at the cost and risk of the parties of the second part and on fair and equitable
127 terms, and the parties of the second part are willing on such terms to undertake the same:

Now therefore, this agreement witnesseth, that the parties of the first part, in consideration of the premises and of the faithful performance of the covenants and agreements of the parties of the second part hereinafter mentioned and contained, and by the parties of the second part to be kept and performed, have granted, leased, and demised, and by these presents do grant, lease, and demise unto the parties of the second part all the railroads of the parties of the first part within the State of Pennsylvania, including their bridge across the Delaware River at Easton, as follows, to wit:

The Lehigh and Susquehanna Railroad, extending from Phillipsburg, in the State of New Jersey, to Union Junction, in Luzerne County, Pennsylvania, where it connects with the railroad built by the Union Coal Company, a distance of one hundred and five miles more or less. Also, the railroad known as the Nanticoke Railroad, situated in said Luzerne County, extending from the Lehigh and Susquehanna Railroad at Ashley to the Newport mines, a distance of eight and one-half miles more or less, with a branch from the same extending to the Lee mines, a distance of two miles more or less; extending also from Ashley to Gardner's Switch, a distance of four and one-half miles more or less; also extending from Union Junction to the Everhart mines, a distance of three miles more or less; and also extending from Mill Creek to the Enterprise mines, a distance of four miles more or less. Also, the branch railroad in the county of Luzerne known as the Nescopec Branch, extending from
128 White Haven to Upper Lehigh, a distance of nine miles more

or less. Also, the Nesquehoning Valley Railroad, situated in the counties of Carbon and Schuylkill, extending from Nesquehoning Junction to Tamanend, where it connects with the Catawissa Railroad, a distance of sixteen and one-half miles more or less. Also, the Tresckow Railroad, in the counties of Schuylkill, Carbon, and Luzerne, extending from the Catawissa Railroad at Silver Brook to the Honey Brook mines, a distance of six and one-half miles more or less. Also, the branch railroad in the counties of Northampton and Lehigh known as the Coplay Branch, extending from Laubach station to the furnaces of the Thomas Iron Company, a distance of one mile more or less. Also, the branch railroad in the county of Lehigh extending from the railroad near Bethlehem, across the Lehigh River, to a connection with the North Pennsylvania Railroad at South Bethlehem, a distance of fourteen hundred and twenty-eight feet more or less. Also, the inclined planes in Luzerne County with all the machinery connected therewith, extending from Ashley to Solomon's Gap station, a distance of three miles more or less; together with all sidings, station-houses, machine shops, and other appurtenances of said roads and branches; and also all and singular the roadways, and also the franchises of the parties of the first part for maintaining and working the same and taking tolls thereon and for demanding and receiving compensation for the use of the same. Excepting and reserving out of this demise the Nesquehoning Tunnel and the railroads or railways laid therein and extending beyond the same; and also all railroads and railways extending from breakers into mines.

To have and to hold the said demised railroad and premises unto the parties of the second part, their successors and assigns, from the first day of April next ensuing the date hereof for and
129 during the continuance of the charters of the said companies and of any renewals of the same; under and subject nevertheless to all the mortgages existing on the said demised premises: Provided, however, that the term of the lease of the Nesquehoning Railroad above mentioned shall not extend beyond the term of nine hundred and ninety-nine years from the 4th of November, 1868, less one day.

And the parties of the second part, in consideration of the premises and of the faithful performance of the covenants and agreements of the parties of the first part hereinafter mentioned and contained to be kept and performed by the parties of the first part, have covenanted and agreed, and by these presents do covenant and agree, to and with the parties of the first part as follows, to wit:

First. That they the parties of the second part shall and will take and well and efficiently operate at their own cost and risk the said demised premises, and all such extensions and additions as may be hereafter made of and to the same under the provisions of this agreement; and shall and will pay to the parties of the first part for the use of the same, at the times hereinafter mentioned, one-third of the gross receipts from the traffic or business of the said demised prem-

ises and extensions and additions thereto, without any other deductions therefrom than are hereinafter mentioned.

Second. The parties of the second part shall and will, on the first day of April next, purchase all the railroad equipment of the parties of the first part mentioned and described in the inventory hereunto annexed, at the prices mentioned or fixed in said inventory, amounting in the aggregate to the sum of two millions three hundred and ten thousand dollars, and in payment of said purchase-money the parties of the second part shall and will assume and pay or discharge at or before the maturity thereof, two millions three hundred and ten thousand dollars of the six per cent bonds of the five millions dollars gold loan of the parties of the first part falling due December 15th, 1897, secured by the mortgage of the demised premises and of said equipment bearing date the 27th of November, 1867, subject to which mortgage this sale is made, the payment or discharges of the said bonds by the parties of the second part to be made by surrender of the same, from time to time, to the trustees of the said last-mentioned mortgage for cancellation, as the said bonds may be purchased or paid by the said parties of the second part, and an equal amount in value of said equipments to be released by the said trustees simultaneously with such surrender, till the whole is released on the surrender of the whole amount of bonds assumed as aforesaid. And the parties of the second part shall and will assume the payment of the interest on said amount of the said bonds from and after the first day of April next, and shall and will pay or provide for the payment of the interest or coupons of said bonds or of such amount thereof as may be from time to time outstanding, as well as the taxes thereon, according to the true intent and meaning of the said bonds. And they also agree to maintain and perpetuate the said equipment and to replace such parts as may be destroyed by accident or use, so far as the same may be required to keep the said equipment not released as aforesaid subject to the said mortgage equal in value to the amount of bonds assumed as aforesaid still outstanding: and the said equipment unpaid for shall be subject to annual inspection by the parties of the first part.

Third. The parties of the second part shall and will, on the first day of April next, take and pay for at a fair valuation to be agreed on by the respective superintendents of the parties hereto, all the shop tools and machinery, all tools used in the maintenance of the road, all rails, ties, spikes, and chairs on hand for repairs, and all materials and supplies on hand in the shops or elsewhere, belonging to the parties of the first part.

Fourth. The parties of the second part shall and will, at their own cost and charges, maintain and perpetuate the railroad and premises demised, and shall and will keep and maintain the same in good order and repair and fit for efficient use, and will so return and redeliver up the same at the termination of this lease: Provided, That in case of damage to the said demised premises by freshet to the extent of five thousand dollars or more at any one time, the re-

pairs shall be made promptly by the parties of the second part, but at the cost and expense of the parties of the first part.

Fifth. The parties of the second part shall and will furnish, from time to time, at their own cost, the necessary machinery, rolling stock, and equipment of all kinds required for all the business of the demised premises, and carry on the said business at fair prices and with due reference to the interests of both companies. It being the true intent and meaning of this agreement, that the demised premises shall be so worked and maintained by the parties of the second part as to secure the largest amount of revenue possible therefrom; but they shall not be bound to perform or do any act or thing which may divert from the railroad of the Lehigh Valley Railroad Company business which naturally belongs to the said railroad.

132 Sixth. It being understood that the parties hereto of the first part and the Lehigh Valley Railroad Company are competitors in the general railroad business of the Wyoming and Lehigh valleys, the parties of the second part do further covenant and agree, that the Lehigh Valley Railroad Company shall not, by any act of the parties of the second part, have or obtain any interest in this agreement which shall be at any time asserted or exercised to the detriment of the parties of the first part, or of the revenues derived from the business of the demised premises, or the future increase thereof; but in case of any contract between the parties of the second part and the Lehigh Valley Railroad Company for merger, lease, or other combination of their interests, the annual revenue or gross receipts of the parties of the first part shall never be less than the one-ninth of the aggregate gross receipts derived from the Lehigh Valley Railroad and its branches and the premises hereby demised.

Seventh. The parties of the second part shall and will furnish, from time to time, on reasonable notice, all the cars that may be required by the parties of the first part, or their assigns, to transport the coal that may be mined by them, or their lessees for the time being, on lands of the said parties of the first part, including their collieries shipping through the Nesquehoning Tunnel, and to transport the same as consigned without unnecessary delay. All coal consigned by the parties of the first part, or their assigns, to points not reached by the roads controlled by the parties of the second part, or by the canals of the parties of the first part, shall be delivered by the parties of the second part to such other roads as will enable it to reach its ultimate destination.

133 Eighth. The parties of the second part shall and will furnish, on reasonable notice, all cars that may be required for the transportation of coal from any colliery on the line of the said demised roads, or any roads connecting therewith, destined for shipment at Coalport or Mauch Chunk or other shipping point by the canal of the parties of the first part. The rates on said coal from the collieries to the canal, over the road worked by the parties of the second part, shall not exceed the rates charged at the same time on the same portions of said road on coal from the same collieries when

destined to same points by railroad: Provided, The aggregate charges shall not be less than sixteen cents per ton, and that all expenses of shipping from the cars into boats, maintaining the tracks and sidings at the shipping points on said canal, and transferring the coal by shifting engines at said points, shall be borne by the parties of the first part.

Ninth. The parties of the second part covenant and agree that on all business passing in whole or in part over said demised railroad and branches and in whole or in part over the railroad or railroads owned or controlled by the parties of the second part, the said parties of the second part shall and will credit to the said road and branches hereby demised their full pro rata proportion (according to the distance carried on said roads) of all gross receipts derived from such business, subject only to such terminal and other charges as are usual and general; and in prorating the distances to and from the Wyoming Valley, they shall be computed as if over the "back track," even when the business is carried over the planes.

Tenth. The parties of the second part further covenant and agree that on coal delivered for transportation by the parties of the
134 first part on sidings at the northern end of the Nesquehoning Tunnel, the rates of transportation shall not exceed the rates charged at the same time from Penn Haven to the same points, on coal from the Lehigh region, either by the parties of the second part or by the Lehigh Valley Railroad Company.

Eleventh. The parties of the second part further covenant and agree that the provisions of the contract with the Wilkesbarre Coal and Iron Company, as far as they relate to transportation, shall extend to all coal mined in the Wyoming Valley by the parties of the first part, or from their lands by their lessees or assigns, and to coal from collieries in said valley whose product is controlled under existing contracts by the parties of the first part; and upon the termination of the said contract with the said Wilkesbarre Coal and Iron Company, as therein provided, the parties of the second part shall and will transport the said coal at rates not higher than those charged to other parties shipping coal from said region, such rates, if unsatisfactory, to be submitted to arbitration as hereinafter provided.

Twelfth. The parties of the second part shall and will assume and well and faithfully perform all the obligations of the parties of the first part under contracts set out in the schedule annexed to this agreement, as far as they relate to transportation upon the said demised premises, and so far as they are binding on the said parties of the first part, receiving in consideration therefor all the benefits of the said contracts.

Thirteenth. The parties of the second part shall and will keep in proper books, to be provided by them, full and accurate and separate accounts of the business of the road and its branches hereby
135 demised, which shall be open to the inspection and examination of the parties of the first part at all times, upon reasonable request and notice.

Fourteenth. The parties of the second part covenant and agree that all persons traveling over the roads hereby demised in the prosecution of the business of the parties of the first part, shall be allowed to pass free of charge, subject to the rules and regulations of the parties of the second part applicable to other persons having the like privileges.

And the parties of the first part do hereby covenant and agree to and with the parties of the second part as follows, to wit:

First. That all coal mined by the parties of the first part on lands now owned by them, or that may be hereafter acquired by them, shall be sent to market over the roads of the parties to this agreement, when destined to points or markets reached by the said roads; and when destined for markets not so reached, it shall be sent as far as practicable over said roads, excepting always coal destined for shipment by canal, and excepting all coal covered by contracts now existing and mentioned in the twelfth of the foregoing covenants of the parties of the second part: Provided, That one-fourth of the coal mined annually by the parties of the first part in the Wyoming region may be sent to markets not reached by lines running towards the Delaware River.

Second. The parties of the first part covenant and agree that in case the coal lands now owned and held by them, or that may be hereafter acquired by them shall be sold, leased, or transferred
136 by them to other parties, all such lands shall nevertheless be subject to the provisions of this agreement.

Third. The parties of the first part covenant and agree that the rates for the transportation of coal and other freights upon their canal, between points common to both railroad and canal, shall be arranged from time to time by the parties hereto; and shall conform as nearly as possible to the rates at the time on the railroad between the same points, it being understood that the canal rates may be reasonably below the rates to the same points on the railroad, as heretofore accustomed, so that each shall be used to reach markets and points which can be best supplied by the respective works.

Fourth. The parties of the first part covenant and agree that their corporate rights and privileges shall, at all times, be used in the construction of additional roads and branches when required as herein stipulated, or to aid the parties of the second part in carrying out the provisions of this agreement.

Fifth. The parties of the first part covenant and agree that the parties of the second part shall have the option, at any time within three years from the first day of August next, to lease the canal and its appurtenances, excepting ground and water rents now existing, at a net annual rent of three hundred thousand dollars, assuming in connection therewith the lease of the Delaware Division Canal.

Sixth. The parties of the first part covenant and agree that in case of the nonpayment of interest by them on any of the mortgages now existing on the demised premises, or if necessary to pro-
137 vide the sums due at any time to any sinking fund stipulated

for in any of the said mortgages, the parties of the second part shall have the right to pay directly to the trustees of any such mortgage so much of the rent due and payable to the parties of the first part under this agreement as may be necessary for the said purposes.

Seventh. The parties of the first part covenant and agree that they have full power and authority, under the laws of Pennsylvania, to make and execute this lease, transfer, and contract, so as to fully vest the said demised premises and property in the parties of the second part as herein provided; and that the parties of the second part shall have full right to take, occupy, and use the said railroad, with its appurtenances, under the lease, transfer, and contract.

And it is mutually covenanted and agreed by the parties hereto as follows:

First. That all expenditures required for extending the road or its branches hereby demised, or for additional branches, second track, additional sidings, stations, shops, or other buildings, for improving the alignment of the road at Stony Creek at a cost not exceeding two hundred thousand dollars, and for masonry walls as a protection against freshets, shall be at the expense of the parties of the first part; but no such expense shall be incurred without the consent in writing of the said parties of the first part, which consent shall not be withheld without reasonable cause. All such improvements shall be made by the parties of the second part, and the cost thereof advanced by them if required, they receiving on such advances a
138 semi-annual percentage equivalent to the dividends declared during the same period on the stock of the parties of the first part: Provided, That such percentage shall not be less than seven per cent per annum: And provided also, That the parties of the first part may at any time refund such advances.

Second. That all railroads or railways, with their branches, extensions, sidings, and buildings connected therewith, hereafter constructed under the franchises of the parties of the first part and with the concurrence of both the parties hereto, shall, when and as the same are constructed, be deemed and taken to pass under this agreement as part of the premises hereby demised, and all necessary deeds to carry this covenant into effect shall be executed by the parties hereto upon request of either.

Third. That the parties of the first part shall and will, by and with the consent of the board of managers of the Railroad Car Trust of Philadelphia and of the Lehigh Equipment Trust of Philadelphia, respectively, assign and transfer to the parties of the second part, and the parties of the second part shall and will take by such assignment all the leases of cars and locomotives made by the said trusts, respectively, to the parties of the first part, and all the cars and locomotives mentioned in the said leases, respectively, and described or mentioned in the second inventory hereto annexed. And such assignment being made, the parties of the second part shall and will thereupon assume and pay all the obligations of the parties of the first part under the said trusts and leases, respectively.

Fourth. That all dwelling-houses, except station-houses, are
139 excepted from this lease. But the parties of the second part may at their own cost erect additional houses on any part of the demised premises and receive the rents of such houses to their own use.

Fifth. That all settlements between the parties and payments of rent by the parties of the second part for the said demised premises shall be made monthly on the fifteenth day of the month, or as soon thereafter as possible.

Sixth. That in case of any difference of opinion between the parties hereto in relation to any of the provisions of this contract, or in case either party shall be dissatisfied with the manner in which the business is done by the other party, the matters in dispute shall be referred to arbitrators to be appointed in the usual manner, whose decision or a majority of them shall be final and conclusive.

Seventh. That in case of any breach of covenant on the part of the parties of the second part, their successors or assigns, and notice thereof given by the parties of the first part, or their assigns, to the parties of the second part, if the same cannot or shall not be fully compensated within a reasonable time thereafter, then and in such case the parties of the first part, or their assigns, may, at their option, declare this lease to be terminated and the agreements herein contained to be rescinded, and may thereupon enter on the demised property and premises as and for condition broken and repossess themselves as of their old and former estate, and may resume, take, use, and enjoy all the rights, privileges, and franchises hereby demised or granted as if this agreement had never been made; and this contract shall from thenceforward be deemed and taken to be utterly ended, saving and excepting the right of the parties of the first
140 part or their assigns to sue for and recover, by any proceedings at law or in equity, compensation for all damages for or by reason of any breach or breaches of any covenant or covenants on the part of the parties of the second part, as fully as if this agreement continued in full force, and saving and excepting the rights of the parties of the second part to the previous repayment of all advances made by them for improvements, and also saving and excepting the personal property purchased and paid for by the parties of the second part; but no such option of declaring this lease terminated shall be exercised by the parties of the first part or their assigns while there exists any default under this agreement on their part.

In witness whereof the said parties have caused their corporate seals to be hereunto affixed, duly attested, the day and year first above written.

By order of the board of managers of the Lehigh Coal and Navigation Company.

[L. S.] E. W. CLARK, *President.*

F. MITCHELL, *Secretary.*

[L. S.] CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Per JOHN TAYLOR JOHNSTON, *President.*

Attest:

SAML. KNOX, *Secretary.*

141 "Exhibit B."

Articles of agreement, made this twenty-ninth day of May, 1883, by and between the Lehigh Coal and Navigation Company of the first part, the Central Railroad Company of New Jersey of the second part, and the Philadelphia and Reading Railroad Company of the third part.

Whereas the Lehigh Coal and Navigation Company and the Central Railroad Company of New Jersey entered into certain articles of agreement under date of March 31st, 1871, a copy of which is hereto annexed, marked "Exhibit A;"

And whereas the parties hereto are willing to covenant and agree to and with one another as hereinafter set forth:

Now, therefore, this agreement witnesseth, that the parties hereto have covenanted and agreed, and do hereby covenant and agree, to and with each other as follows:

First. This agreement is to be deemed and taken to have been incorporated into the contract of March 31st, 1871 (but only to be operative from and after June 1st, 1883), as if originally there written, and each party is to have the same remedies as are provided in the original contract for all rights secured by the contract as thus modified, and as if the said original contract had been herein recited and set forth at length as part hereof; and wherever in this agreement the expression

"Lehigh and Susquehanna Railroad and branches" is used, it
142 shall be taken to include all the railroads now or hereafter to be operated under the original contract of March 31st, 1871, and this supplemental agreement.

Second. The Central Railroad Company of New Jersey agrees that inasmuch as the Philadelphia and Reading Railroad Company, after it takes possession of the Lehigh and Susquehanna Railroad and branches, will also become responsible for the proper conduct of the business under the provisions of the aforesaid agreement of March 31st, 1871, any breach of the covenants of the original contract or of this supplemental agreement by the Philadelphia and Reading Railroad Company shall have the same effect in all respects as if the breach had been committed by the Central Railroad Company of New Jersey.

Third. The Philadelphia and Reading Railroad Company agrees that it will assume and become liable for the faithful execution of all the covenants in the said agreement contained, and on the part of the said The Central Railroad Company of New Jersey to be kept and performed, and will keep, maintain, and fulfill the same according to their full intent and meaning, and will carry out all other contracts made by or on behalf of the Central Railroad Company of New Jersey, in which the Lehigh Coal and Navigation Company may have an equitable interest; will develop the business of the Lehigh and Susquehanna Railroad and branches in accordance with the provisions of the said agreement of March 31st, 1871, and the terms of this supplemental agreement; and where additional rail-

roads shall be necessary to develop and secure business in the anthracite coal fields east of the line of the Little Schuylkill and Catawissa Railroads, will cause them to be built under the provisions of
143 the first and second mutual covenants of the contract of 1871; will cause the development of the Lehigh and Wilkesbarre Coal Company's lands to proceed pari passu with that of the lands of the Philadelphia and Reading Coal and Iron Company, so that the production of the two coal estates shall bear to each other the numerical relation of twenty-eight for the Lehigh and Wilkesbarre Coal Company to seventy-two for the Philadelphia and Reading Coal and Iron Company, at least until the production of the Lehigh and Wilkesbarre Coal Company's lands shall reach three million tons per annum, beyond which it shall not be required to be increased, but which shall be maintained till it shall be no longer possible to make the said mines produce at that rate; and if the production of the said lands shall in any one year bear a less ratio to the production of the Philadelphia and Reading Coal and Iron Company's lands than the aforesaid ratio, will send such an amount of coal from the Philadelphia and Reading Coal and Iron Company's, or other anthracite coal lands lying west of Tamanend, over the Lehigh and Susquehanna Railroad from Tamanend, as shall bring the coal tonnage-mileage of the Lehigh and Susquehanna Railroad system up to what it would have been if the above stipulation in regard to the production of the Lehigh and Wilkesbarre Coal Company's lands had been carried out, and will cause the production of the Lehigh and Wilkesbarre Coal Company's lands to pass to or towards its market over the lines of the Lehigh and Susquehanna Railroad and branches. And it further agrees that the rates of transportation of coal, or other freight, from or to any property in the anthracite region which may at any time be owned, controlled, or operated by the Lehigh Coal and Navigation Company, shall never be higher than the lowest rates given to any other producer or shipper of anthracite coal for
144 similar consignments and like distances, and that it will join with the Central Railroad Company of New Jersey in carrying out the provisions of the contract between the Central Railroad Company of New Jersey and the Alliance Coal Mining Company, of August 10th, 1881, a copy of which, marked "Exhibit B," is hereto annexed.

Fourth. And the said The Philadelphia and Reading Railroad Company further covenants and agrees that the aggregate rental of the The Lehigh and Susquehanna Railroad, after the date of this agreement, shall never in any year be less than one million four hundred and fourteen thousand four hundred dollars, but if the one-third of the gross receipts from the operation of the Lehigh and Susquehanna Railroad (settlements for which shall be made monthly as heretofore), shall not amount in any year to the said sum, the Philadelphia and Reading Railroad Company will nevertheless pay at the end of the calender year such additional sum as will make the rental of the Lehigh Coal and Navigation Company from the said

Lehigh and Susquehanna Railroad and branches equal thereto; and in consideration of this undertaking, the Lehigh Coal and Navigation Company covenants and agrees that after it shall have received from its one-third of the gross receipts derived from the operation of the said Lehigh and Susquehanna Railroad and branches, during any calendar year prior to December 31st, 1887, the sum of one million seven hundred and twenty-eight thousand seven hundred dollars, or in any calender year thereafter prior to December 31st, 1892, the sum of one million eight hundred and eighty-five thousand eight hundred dollars, or in any calendar year thereafter the sum of
145 two million and forty-three thousand dollars, together with a further sum in each year equal to seven per cent upon the amounts which shall be charged after December 31st, 1882, upon the books of the Lehigh Coal and Navigation Company for payments for right of way, or for expenditures made or to be made by the Central Railroad Company of New Jersey or the Philadelphia and Reading Railroad Company, for construction as shown by the accounts rendered or to be rendered by either of the said corporations under the first and second of the mutual covenants in the original agreement of March 31st, 1871, it will waive, relinquish, and release, and does hereby waive, relinquish, and release the surplus or excess of its one-third share of the said gross receipts to the said The Philadelphia and Reading Railroad Company, but nothing herein contained shall be deemed or taken to release the Lehigh Coal and Navigation Company from paying seven per cent on the amount already advanced by the Central Railroad Company of New Jersey, and on the amounts hereafter expended, and which are repayable by the Lehigh Coal and Navigation Company, as provided by the agreement of March 31st, 1871, until the Lehigh Coal and Navigation Company shall have refunded such advances. And the Central Railroad Company of New Jersey hereby agrees that the sums herein stipulated to be paid and which it agrees may be paid to the Lehigh Coal and Navigation Company shall be in lieu and satisfaction of the rent reserved in the agreement of May 29th, 1883, between the Central Railroad Company of New Jersey and the Philadelphia and Reading Railroad Company (a copy of which, marked "Exhibit C," is hereto annexed) as accruing under the provisions of the agreement of March 31st, 1871; and upon the payment by the Philadelphia and Reading
146 Railroad Company to the Lehigh Coal and Navigation Company, its successors and assigns, of the sums herein stipulated to be paid the said The Philadelphia and Reading Railroad Company shall be relieved from said portion of the rental reserved in the agreement of May 29th, 1883, aforesaid, and the excess or remainder, if any, of said gross receipts, after making the payments herein stipulated to the Lehigh Coal and Navigation Company, shall be retained by the Philadelphia and Reading Railroad Company for its own use and benefit.

Fifth. And the parties hereto further agree, that in case of any difference of opinion between the parties hereto in relation to any

of the provisions of this agreement, or in case either party shall be dissatisfied with the manner in which the business is done by the other party, the matters in dispute shall be referred to arbitrators, one to be appointed by the Philadelphia and Reading Railroad Company and one by the Lehigh Coal and Navigation Company, and the two thus chosen to select a third, and their decision or that of a majority of them shall be final and conclusive.

Sixth. And all the parties hereto agree that in case of any breach of covenant on the part of the parties of the second or third part, if the same shall not be fully compensated within a reasonable time, the party of the first part may at its option declare the agreement of March 31st, 1871, to be terminated and the agreements therein contained and this agreement to be rescinded, and may thereupon enter on the demised premises as and for condition broken and repossess itself of its old and former estate, and may resume, take, use
147 and enjoy all its original rights, privileges, and franchises, as if this agreement and the said agreement of March 31st, 1871, had never been made.

In witness whereof, the parties hereto have caused their corporate seals, duly attested, to be hereunto affixed, the day and year first above written.

Sealed and delivered in the presence of us.

As to the signature of Joseph S. Harris, President.

S. SHEPHERD.

SAML. KNOX.

ALBERT FOSTER.

J. S. HARRIS, *Presdt.*

Attest:
S. SHEPHERD, *Secretary.* [Seal L. C. & N. Co.]

H. S. LITTLE, *President.*

Attest:
SAML. KNOX, *Secy.* [Seal C. R. R. Co. of N. J.]

FRANKLIN B. GOWEN, *Prest.*

Attest:
ALBERT FOSTER, *Secty.* [Seal P. & R. R. R. Co.]

148 "Exhibit C."

This agreement, made this twenty-seventh day of January, A. D. one thousand eight hundred and eighty-seven (1887), between the president, managers, and company of the Delaware and Hudson Canal Company, hereinafter referred to as the Delaware Company, and the Lehigh Coal and Navigation Company, hereinafter referred to as the Lehigh Company.

Whereas the Delaware Company did on the seventh day of November, 1886, take control of the Union Coal Company's railroad, hereinafter called the Union Railroad, which railroad had theretofore

been operated jointly by the Lehigh Company and the Delaware Company, and has furnished the connection between Union Junction, the terminus of the Lehigh and Susquehanna Railroad of the Lehigh Company, and Scranton; and

Whereas the Lehigh Company, itself or through the Wilkes-Barre and Scranton Railway Company, a corporation controlled by it, has purchased ground for terminal facilities at Scranton, and has located and proposes to build a line between Scranton and a point near Minooka Station, hereinafter called Minooka Junction, and proposes also to build or to procure the building of, and to use, when built, a cut-off line from Laurel Run Station on the Lehigh and Susquehanna Railroad of the Lehigh Company, to a connection with the Union Railroad near Pittston Station, at a point hereinafter called Pittston Junction; and

149 Whereas both parties hereto agree that it is desirable to make such use of the existing lines of railroad as to meet the requirements of the public in the matter of transportation, and for this purpose the Delaware Company is willing to grant permanent rights to the Lehigh Company for so much of the said Union Railroad as the Lehigh Company may desire to use as hereinafter provided; and

Whereas the object of this agreement is to furnish the Lehigh Company with a line of railway connecting its present railway at Union Junction with the proposed railway from Minooka Junction to Scranton, and also with the proposed railway from Laurel Run Station to Pittston Junction, over which connecting line its traffic shall pass freely, and from which it cannot be excluded by reason of any adverse interest obtaining control of the management of the Delaware Company's line:

Now this agreement witnesseth:

First. That the Delaware Company has granted, demised, and let, and by these presents doth grant, demise, and let unto the Lehigh Company for a period of nine hundred and ninety-nine years from the date of this agreement, subject to the reasonable regulation and control of the lessor as to the movement and government of trains, the right to pass with its trains and locomotives over the aforesaid line of the lessor between Union Junction and Minooka Junction, and vice versa, with the right to use in connection with such trains all present or future water stations, sidings, and other facilities necessary for the accommodation of such trains and the traffic to be transported by them, as freely as if the lessee was the owner of the

150 railroad hereby demised, paying to the lessor, as rent for the demised premises, forty-two and one-half per cent of the gross earning on all coal, passengers, express, parcel, and freight traffic that shall accrue to such portion of the Union Railroad as it, the lessee, shall use; the total gross earnings in each case being divided in proportion to the actual mileage used of the Union Railway and the Lehigh Company's railroad, provided that if the Lehigh Company shall take water from any of the Delaware Company's water

stations, it shall share in the expense of maintaining such stations in proportion to the consumption of water by each of the parties hereto. But the right to haul such traffic over the Union Railroad by the Lehigh Company's locomotives shall not apply to business originating at points north of Scranton on the Delaware Company's lines, or on the connecting lines forming the extensions thereof and destined to points south of Pittston Junction or Wilkes-Barre on the Lehigh Company's lines, or on connecting lines forming the extensions thereof, or originating at points south of Pittston Junction or Wilkes-Barre on the Lehigh Company's lines, or on connecting lines forming extensions thereof and destined to points north of Scranton, on the Delaware Company's lines, or on connecting lines forming extensions thereof; all of which busineess shall be hauled by the Delaware Company's locomotives as provided in section third.

Second. The Lehigh Company shall have the right to make a connection between the Union Railroad tracks and the tracks of the line to be built from Laurel Run Station to Pittston Junction, and also a connection between the Union Railroad tracks and the tracks of the Spring Brook Railway near Moosic Station; and also a connection between the Union Railroad tracks and the tracks of the
151 Lackawanna and Bloomsburg Railroad at such point between Moosic and Minooka as may be agreed on with the Delaware, Lackawanna and Western Railroad Company, it being the true intent of this stipulation to enable the Lehigh Company to secure business from the roads just named; but this right of connecting is not intended to permit it to secure business from other points on the Delaware Company's lines by means of lateral or auxiliary tracks leading thereto from the said Lackawanna and Bloomsburg Railroad and the said Spring Brook Railway, nor to take over the Union Railroad business which, having originated at points south of the parallel of latitude passing through Wilkes-Barre, shall reach Wilkes-Barre by other roads than the Lehigh and Susquehanna Railroad, and shall be destined to points on the Union Railroad east of Wilkes-Barre or to other points on the Delaware Company's lines.

Third. It is agreed for the present that through freight traffic originating at or destined to points on the Delaware Company's lines north of Scranton or on connecting lines forming extensions of the Delaware Company's lines and through freight traffic destined to or originating at points on the Lehigh Company's line south of Wilkes-Barre or on connecting lines forming extensions of the Lehigh Company's lines shall be exchanged at Wilkes-Barre and shall be hauled by the Delaware Company's locomotives over the Union Railroad, and that the Delaware Company, for all such freight hauled by its locomotives over the Union Railroad, shall be entitled in the division of the through rate to be credited with at least forty miles from Wilkes-Barre, though the distance so hauled may have been less; and similarly, that on all freight so exchanged and hauled by the Lehigh Company's locomotives south of Wilkes-Barre, the
152 Lehigh Company shall be entitled to be credited with at least

forty miles; but it is further agreed that after the cut-off lin from Laurel Run station to Pittston Junction shall have been com pleted the said exchange shall be made at Pittston Junction, in whic case each party hereto shall, as before, be entitled to at least fort miles in the division of the through freight rate. But nothing i this section shall be so construed as to require the Lehigh Compan to receive less in the division of the freight rate on business of th western cooperative lines than it now receives, except it should asse to such a change.

Fourth. Each party hereto will provide its own time-tables for th running of such trains over its lines as it may desire in carrying ou the provisions of this agreement, it being understood that the Del ware Company's trains are to have preference over the Lehigh Com pany's trains of the same class on the Union Railroad.

Fifth. It is agreed that the parties hereto will extend each to th other as good facilities and rates in every respect as it accords to th most favored of the lines with which it may become connected.

Sixth. Each of the parties hereto shall be permitted to examin such of the books and records or other documents or papers of th other party as may be necessary to verify or confirm settlements pr posed or made in accordance with the terms of this agreement.

Seventh. It is intended that the rights of trackage hereinbefo granted by the Delaware Company to the Lehigh Company sha
continue during the term of this agreement; and that the su
153 cessors and assigns of either of the parties hereto shall hav
the rights and privileges and shall be charged with the duti herein assumed by the parties to this agreement, but the basis compensation to the Delaware Company for the use of the railroa and other facilities specified in the first section, and the basis of th minimum distances to be charged by either party on through freigh as specified in the third section, may be readjusted on the first da of January, 1892, and each five years thereafter: Provided, Tha either of the parties hereto shall give ninety days' notice to the oth before the expiration of each period of its desire for such readjus ment. The basis on which such readjustments shall be made sha be the usual railroad practice existing at the time of such readjus ments, and if the two parties shall not be able to agree on this que tion or on any other question arising under this agreement, the ma ters in dispute shall be referred to arbitrators, one to be appointe by the Delaware Company and one by the Lehigh Company, and th two thus chosen to select a third, and their decision or that of majority of them shall be final and conclusive.

Eighth. The Lehigh Company shall have the right to assign i interest in this contract to the Central Railroad Company of Ne Jersey for the term during which that company shall be the less of the Lehigh and Susquehanna Railroad of the Lehigh Compan and the Central Railroad of New Jersey shall thereupon be entitle to have and exercise all the rights and privileges herein granted b this agreement to the Lehigh Company; and the Lehigh Compan

upon the termination of the said lease of the Lehigh and Susquehanna Railroad to the Central Railroad Company of New Jersey, shall have the right to resume its rights under this agreement
154 as fully as if they had never been assigned to any other company, but neither of the parties hereto shall have the right to otherwise assign any of its rights under this agreement without the consent in writing of the other party.

Ninth. In case of accident to the trains passing over any part of the Union Railroad that may be used by the Lehigh Company, the Lehigh Company and the Delaware Company shall each be held liable for any damage done by such accidents occurring through the neglect or misconduct of its own employés or through the failure or defect of its own equipment. The Delaware Company shall be liable for any damage done through the failure or defect of its roadway or the appurtenances thereto. When damage occurs to the property of the parties hereto through the joint negligence of their employés, neither party shall have recourse against the other, but where damage occurs to the public and one of the parties is compelled to pay the same, the other party contributing to such negligence shall contribute equally to such loss.

Tenth. In case either of the parties hereto shall willfully violate the terms of this agreement, the other party may terminate the same upon giving six months' notice of its election to do so.

Eleventh. It is agreed that if at any time hereafter the Lehigh Company shall construct or operate any other line beyond Scranton, except as herein provided, this agreement shall cease and determine.

In witness whereof the said parties hereto have caused their
155 respective corporate seals, duly attested, to be hereunto affixed the day and year first above written.

Sealed and delivered in the presence of the president, managers, and company of the Delaware and Hudson Canal Company, by

[SEAL.] (Signed) R. M. OLYPHANT, *President.*

Attest:

(Signed) J. C. HARTT, *Treasurer.*

By order of the board of managers of the Lehigh Coal and Navigation Company,

[SEAL.] (Signed) J. S. HARRIS, *President.*

(Signed) S. SHEPHERD, *Secretary.*

STATE OF NEW YORK,

City and County of New York, ss:

On this fourth day of February, 1887, before me personally came James C. Hartt, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of New York; that he was the treasurer of the president, managers, and company of the Delaware and Hudson Canal Company; that he knew the corporate seal of the said company; that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed by

order of the board of managers of the said company; and that he signed his name thereto by the like order as treasurer of the said company; and the said James C. Hartt further said that he
156 was acquainted with R. M. Olyphant, and knew him to be the president of said company; that the signature of the said R. M. Olyphant, subscribed to the said instrument, was in the genuine handwriting of the said R. M. Olyphant, and was thereto subscribed by the like order of the said board of managers, and in the presence of him, the said James C. Hartt.

[SEAL.] (Signed) F. M. OLYPHANT,
(30)
Notary Public, New York County.

STATE OF NEW YORK,
City and County of New York, ss:

I, James A. Flack, clerk of the city and county of New York, and also clerk of the Supreme Court for the said city and county, the same being a court of record, do hereby certify that F. M. Olyphant, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the fourth day of February, 1887.

(Signed) JAMES A. FLACK, *Clerk.*

157 STATE OF PENNSYLVANIA,
City of Philadelphia, ss:

Be it remembered, that on this fifth day of February, A. D. one thousand eight hundred and eighty-seven (1887), before me the subscriber, a notary public in and for said city, personally came and appeared S. Shepherd, secretary of the foregoing named corporation, the Lehigh Coal and Navigation Company, who, being duly sworn according to law, deposes and says that he was personally present at the execution of the foregoing indenture, and saw J. S. Harris, president of the said corporation, affix the seal of the said company to the said indenture, and deliver the same as the act and deed of the said company; and that the name of this deponent, subscribed to the said indenture as a witness thereto, and as secretary of the said corporation, in attestation of the due execution and delivery of said indenture, is of this deponent's own proper handwriting.

Sworn to and subscribed before me this the day and year first aforesaid. Witness my hand and seal.

(Signed) S. SHEPHERD.

[SEAL.] (Signed) WM. C. ALDERSON, *Notary Public.*

STATE OF PENNSYLVANIA,
County of Luzerne, ss:

Recorded in the office for recording deeds, &c., in and for said county, in deed book No. 262, page 480.

Witness my hand and official seal, at Wilkes-Barre, this fifteenth day of February, 1887.

[SEAL.] (Signed) JOSEPH J. MCGINTY, *Recorder.*
Per TERRY, *Dept.*

158 LACKAWANNA COUNTY, *ss:*

Recorded in the office for recording of deeds, &c., in and for said county, in deed book No. 43, page 339, &c.

Witness my hand and seal of office this twenty-fourth day of March, A. D. 1887.

[SEAL.] (Signed) ELIEZER D. JENKINS, *Recorder.*

163 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, defendant.	April session, 1908. No. 89. In Equity.

It is stipulated and agreed between counsel in the above cause that its submission on bill and answer and any averment or admission in the pleading of either party contained shall in nowise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted, and shall be operative and take effect only with respect to the present suit and for the purposes thereof.

CHARLES J. BONAPARTE,
Attorney-General.
JOHN G. JOHNSON,
Atty. for Deft.
ROBERT W. DE FOREST,
Atty. for Deft.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 89. April session, 1908. Equity. U. S. *v.* The Central Railroad Company of New Jersey. Stipulation of counsel. Filed June 16, 1908. Henry B. Robb, clerk. L.

164 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, defendant.	April session, 1908. No. 89. In Equity.

The complainant in this cause hereby joins issue with the defendant, The Central Railroad Company of New Jersey, and will submit

the cause, by permission of the court, on bill, answer, and the stipulation and agreement between counsel in said cause filed.

CHARLES J. BONAPARTE,
Attorney-General.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 89. April session, 1908. Equity. U. S. *v.* The Central Railroad Company of New Jersey. Replication. Filed June 16, 1908. Henry B. Robb, clerk. L.

[NOTE.—Here follow opinions, which are omitted in printing this record by stipulation of counsel. The opinions will be found in the record of the case of the United States ex rel., the Attorney-General of the United States, plaintiff in error, *vs.* The Delaware, Lackawanna & Western Railroad Company, No. 562, of October term, 1908. And U. S. v Lehigh Co, No 91 1907 1909)

241 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA *vs.* CENTRAL RAILROAD OF NEW JERSEY.	April sessions, 1908. In Equity. No. 89.

Before DALLAS, C. J.

And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penna. No. 89. U. S. v. Central Railroad of New Jersey. Decree dismissing bill. Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

242 No. 89. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, defendant.	

Now comes the complainant, the United States of America, through Charles J. Bonaparte, Attorney-General of the United States, and makes and files, on behalf of said United States, its assignment of

errors, upon which it will rely upon its appeal to the Supreme Court of the United States from the judgment and decree made and entered in this case by the Circuit Court of the United States for the Eastern District of Pennsylvania, on the sixth day of October, in the year nineteen hundred and eight, that is to say:

1. That the Circuit Court erred in dismissing the bill of complaint in this case;

2. That the Circuit Court erred in refusing the injunction prayed in this case;

3. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States;

4. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities
243 clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States in so far as it affects the transportation of property owned, acquired, manufactured, mined, or produced by the defendant prior to the enactment of the said so-called "commodities clause;"

5. That the Circuit Court erred in holding that the said so-called "commodities clause" is not a regulation of interstate commerce within the true meaning of the third clause of the eighth section of article one of the Constitution of the United States;

6. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, deprives the defendant of its property in violation of the fifth amendment of the Constitution;

7. That the Circuit Court erred in holding that the said so-called "commodities clause" constitutes a prohibition and not a regulation of interstate commerce, and, as such, exceeds the constitutional powers of the Congress conferred by the third clause of the eighth section of article one of the Constitution of the United States;

8. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, is discriminative in its provisions, and therefore constitutionally invalid;

9. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, constitutes an attempt to deprive the defendant of the right to use and enjoy its private property, and, as such, is incompatible with free government and inconsistent with the constitutional prohibitions against taking private property for public use without just compensation and depriving any person of liberty or property without due process of law;

244 10. That the Circuit Court erred in sustaining the objections raised by the defendant's answer to the constitutional validity of the so-called "commodities clause," the legislation above mentioned, and in not overruling each and all of the said objections.

Wherefore the said complainant and petitioner prays that the said judgment and decree of the Circuit Court of the United States for the Eastern District of Pennsylvania be reversed.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 89. April session, 1908. In Equity. The United States of America vs. The Central Railroad Company of New Jersey. Assignment of errors. Filed October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

245 No. 89. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, defendant.

To the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

The United States of America, through Charles J. Bonaparte, Attorney-General of the United States, feeling itself aggrieved by the judgment and decree entered in the above entitled case, on the sixth day of October, in the year nineteen hundred and eight, does hereby appeal from said judgment and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

Dated October sixth, 1908.

246 (Endorsed:) U. S. C. C., E. D. of Penna. No. 89. April session, 1908. In Equity. United States of America v. The Central Railroad Company of New Jersey. Petition for appeal. The clerk will please file within petition for appeal, the assignment of errors herewith, and order of court allowing appeal when granted.

Charles J. Bonaparte, Attorney-General. J. Whitaker Thompson, U. S. attorney. Filed October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

247 No. 89. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, defendant.

Before DALLAS, C. J.

It is hereby ordered that the appeal in the above-entitled case to the Supreme Court of the United States be, and is hereby, allowed as prayed.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penna. No. 89. April session, 1908. In Equity. United States of America vs. The Central Railroad Company of New Jersey. Order of court allowing appeal. Filed, October 6th, 1908. Henry B. Robb, clerk. By L., deputy clerk.

248 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Central Railroad Company of New Jersey, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington within thirty days, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein United States of America is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George M. Dallas, judge of the Circuit Court of the United States, this sixth day of October, in the year of our Lord one thousand nine hundred and eight.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

Service accepted.

JOHN G. JOHNSON,
Per JOS. BAYARD,
Attorney for Appellee.

249 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

I, Henry B. Robb, clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of United States of America *v.* The Central Railroad Company of New Jersey, No. 89, April session, 1908, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this seventh day of October, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-three.

[SEAL.] HENRY B. ROBB,
Clerk of C. C.

250 (Indorsement on cover:) File No. 21363. E. Pennsylvania. C. C. U. S. Term No., 567. The United States of America, appellant, *vs.* The Central Railroad Company of New Jersey. Filed October 10th, 1908. File No. 21363.

O

Additional docket entries.

1908, Oct. 7. Record transmitted to U. S. Supreme Court.

1910, Feb. 22. Mandate received from U. S. Supreme Court ordering that the decree of this court be, and the same is hereby, reversed, &c., and filed.

1910, Feb. 25. Argued sur motion for settlement of decree.

1910, Mar. 7. Decree reinstating cause filed. Decree denying motion of complainant to dismiss bill of complaint without prejudice filed. Decree dismissing bill filed.

1910, Apr. 29. Assignments of error filed. Petition for appeal filed. Order allowing appeal filed. Citation allowed and issued. Citation returned " service accepted " and filed.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, greeting:

Whereas lately in the Circuit Court of the United States for the Eastern District of Pennsylvania, before you or some of you, in a cause between the United States of America, complainant, and the Central Railroad Company of New Jersey, defendant, wherein the decree of the said Circuit Court, entered in said cause on the 6th day of October, A. D. 1908, is in the following words, viz: "And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed," as by the inspection of the transcript of the record of said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to Congress, in such case made and provided, fully and at large appears;

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and eight, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings in conformity with the opinion of this court.

MAY 3, 1909.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of June, in the year of our Lord one thousand nine hundred and nine.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

(Endorsed:) 89. Ap. S., 1908. File No. 21363. Supreme Court of the United States. No. 567. October term, 1908. The United States of America vs. The Central Railroad Company of New Jersey. Mandate. Filed February 22, 1910. Henry B. Robb, Clerk, by L., Deputy Clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA,
v.
THE CENTRAL RAILROAD OF NEW JERSEY.

April sessions, 1908. In equity, No. 89.

Before Gray, Buffington & Lanning, J. J.

Whereas in the above-entitled cause the following decree was entered in this court on October 6, 1908: "And now this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed;" and

Whereas the said decree was taken to the Supreme Court of the United States by an appeal; and

Whereas on the 3d day of May, 1909, a decree was entered in the said Supreme Court in the following words: "It is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed. And it is further ordered that this cause be, and the same is hereby, remanded to the Circuit Court for further proceedings in conformity with the opinion of this court;" and

Whereas the mandate of that court issued on the 17th day of June, 1909, and has been called to the attention of this court;

Now, therefore, it is ordered that the decree of this court entered October 6, 1908, dismissing the bill herein, be set aside, and the cause be re-instated upon the docket of this court.

BY THE COURT.

Dated MARCH 7, 1910.

Attest:
HENRY B. ROBB, *Clerk.*

(Indorsed:) No. 89. Apr. sess., 1908. In the Circuit Court of the United States, Eastern District of Pennsylvania. In equity. United States of America v. The Central Railroad of New Jersey. Decree reinstating cause.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
v.
THE CENTRAL RAILROAD OF NEW JERSEY. } April sessions, 1908. In equity, No. 89.

Before Gray, Buffington, and Lanning, J. J.

Whereas in the above-entitled cause the following decree was entered in this court on October 6, 1908: "And now this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed;" and

Whereas the said decree was taken to the Supreme Court of the United States by an appeal; and

Whereas on the 3d day of May, 1909, a decree was entered in the said Supreme Court in the following words: "It is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed. And it is further ordered that this cause be, and the same is hereby, remanded to the Circuit Court for further proceedings in conformity with the opinion of this court;" and

Whereas the mandate of that court issued on the 17th day of June, 1909, and has been called to the attention of this court; and

Whereas, upon motion of the complainant, the cause was reinstated upon the docket of this court; and

Whereas said complainant then moved that the said decree of dismissal entered October 6, 1908, be changed to read: "And now, the sixth day of October, nineteen hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed without prejudice," and counsel having been heard on said motion; and

Whereas it appears to the court upon the pleadings that the defendant, The Central Railroad Company of New Jersey, is not transporting in interstate commerce from any State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or to any foreign country, any coal which has been mined, manufactured, or produced by it, and which it owns in whole or in part at the time of transportation, except such coal as is necessary and intended for its use in the conduct of its business as a common carrier, and in the opinion of the court is not violating the "commodities clause" within the meaning of the clause as construed by the Supreme Court:

Now, therefore, it is ordered that said motion be denied.

Dated March 7, 1910.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Indorsed:) No. 89. Apr. sess., 1908. In the Circuit Court of the United States, Eastern District of Pennsylvania. In equity. United States of America v. The Central Railroad of New Jersey. Decree denying motion of complainant to dismiss bill of complaint without prejudice.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA *v.* THE CENTRAL RAILROAD OF NEW JERSEY.	April sessions, 1908. In equity, No. 89.

Before Gray, Buffington, and Lanning, J. J.

Whereas in the above-entitled cause the following decree was entered in this court on October 6, 1908: "And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed;" and

Whereas the said decree was taken to the Supreme Court of the United States by an appeal; and

Whereas on the 3d day of May, 1909, a decree was entered in the said Supreme Court in the following words: "It is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed. And it is further ordered that this cause be, and the same is hereby, remanded to the Circuit Court for further proceedings in conformity with the opinion of this court;" and

Whereas the mandate to this court issued on the 17th day of June, 1909, and has been called to the attention of the court; and

Whereas, referring to the said opinion of the Supreme Court of the United States and in conformity thereto, it appears upon the pleadings in this cause that the defendant The Central Railroad Company of New Jersey is not transporting in interstate commerce from any State, Territory, or the District of Columbia to any State, Territory, or the District of Columbia, or to any foreign country, any coal which has been mined, manufactured, or produced by it, and which it owned in whole or in part at the time of transportation, except such coal as is necessary and intended for its use in the conduct of its business as a common carrier;

And whereas the Attorney-General of the United States has moved for the entry of a decree dismissing the bill without prejudice, and said motion has been opposed by the defendant, and the court has denied the motion;

And whereas the Attorney-General has declared his motion to dismiss without prejudice having been denied, that he intends to proceed no further in this court in this cause:

It is therefore on motion of counsel for the defendant ordered and decreed that the bill be and the same is hereby dismissed.

Dated March 7, 1910.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Indorsed:) No. 89. Apr. sess., 1908. In the Circuit Court of the United States, Eastern District of Pennsylvania. In equity. United States of America v. The Central Railroad of New Jersey. Decree dismissing bill.

Equity, No. 89.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Central Railroad Company of New Jersey, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the city of Washington, D. C., within thirty days, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States for the Eastern District of Pennsylvania, wherein United States of America is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. M. Lanning, Judge of the Circuit Court of the United States for the Eastern District of Pennsylvania, this 29th day of April, in the year of our Lord nineteen hundred and ten (1910).

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

Service accepted.

JOHN G. JOHNSON,
Attorney for Appellee.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW Jersey, defendant.	In equity. April sessions, 1908. No. 89.

To the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

The United States of America, through William S. Kenyon, assistant to the Attorney-General of the United States, feeling itself ag-

grieved by the judgment and decree entered in the above-entitled cause on the seventh day of March, in the year nineteen hundred and ten, does hereby appeal from said judgment and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

April 29th, 1910.

WILLIAM S. KENYON,
Assistant to the Attorney-General.
EDWIN P. GROSVENOR,
Special Assistant to the Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, defendant.	In equity. sessions, No. 89.	April 1908.

Before , C. J.

It is hereby ordered that the appeal in the above entitled case to the Supreme Court of the United States be, and is hereby, allowed as prayed.

W. M. LANNING, *Circuit Judge.*
BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, PETITIONER, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, defendant.	In equity. sessions, No. 89.	April 1908.

Before Gray, Buffington, and Lanning, circuit judges.

Comes now the United States of America, by counsel, and in connection with its petition for appeal to the Supreme Court of the United States from the decree of the Circuit Court of the United States for the Eastern District of Pennsylvania entered herein on the

seventh day of March, 1910, dismissing absolutely the bill of complaint herein, makes and files the following assignment of errors:

I.

The complainant having filed a bill of complaint praying an injunction under the fifth paragraph of the first section of the act to regulate commerce as amended by the act approved June 29, 1906, commonly called the "commodities clause," in which bill it was stated in effect that the Central Railroad Company of New Jersey was transporting certain coal in violation of the commodities clause, and such proceedings having been had in said Circuit Court, that said bill was dismissed by the Circuit Court on the ground that said act of Congress was unconstitutional and void, and complainant having prosecuted an appeal to the United States Supreme Court, and that court having construed said act, and having held it to be constitutional as so construed, and having remanded the case to the court below for further proceedings in conformity with the opinion of the Supreme Court, and the complainant on the filing of the mandate in the court below, and on the reinstatement of the case in that court, having moved that the court dismiss the complaint without prejudice, the Circuit Court erred in denying said motion of complainant.

II.

The complainant having filed a bill of complaint praying an injunction under the fifth paragraph of the first section of the act to regulate commerce as amended by the act approved June 29, 1906, commonly called the "Commodities clause," in which bill it was stated in effect that the Central Railroad Company of New Jersey was transporting certain coal in violation of the commodities clause, and such proceedings having been had in said Circuit Court that said bill was dismissed by the Circuit Court on the ground that said act of Congress was unconstitutional and void, and complainant having prosecuted an appeal to the United States Supreme Court, and that court having construed said act, and having held it to be constitutional as so construed, and having remanded the case to the court below for further proceedings in conformity with the opinion of the Supreme Court, and the complainant on the filing of the mandate in the court below, and on the reinstatement of the case in that court having moved that the court dismiss the complaint without prejudice and the court having denied said motion to dismiss without prejudice, and the defendant then having moved the court to dismiss the bill of complaint absolutely, said Circuit Court erred in dismissing said bill of complaint absolutely.

III.

The Circuit Court erred in dismissing the bill of complaint absolutely, for that the proceedings herein were commenced with the object and purpose of settling the differences between the complainant and the defendant concerning the meaning of the commodities

clause and the power of Congress to enact it as correctly interpreted, and on said appeal to the United States Supreme Court that court construed the commodities clause and held it to be constitutional as so construed, and remanded the case for further proceedings in conformity with its opinion, but as the bill of complaint herein did not state a cause of action within the construction placed upon the commodities clause by the Supreme Court by reason of the omission of certain allegations of fact setting up the relations existing between the defendant and certain coal companies, and accordingly the pleading of complainant was defective, the said bill of complaint should have been dismissed without prejudice, for said dismissal without prejudice would have enabled the complainant to file a new complaint in another action for the same cause of action, whereas the absolute dismissal of the bill by the Circuit Court constitutes a bar to any further litigation of the same subject between the complainant and the defendant, and accordingly said Circuit Court erred in dismissing the bill of complaint absolutely.

By reason whereof, the United States prays that the said decree dismissing the bill of complaint absolutely herein be reversed.

April 29th, 1910.

WILLIAM S. KENYON,
Assistant to the Attorney-General.
EDWIN P. GROSVENOR.
Special Assistant to the Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

Filed April 29, 1910.

HENRY B. ROBB, *Clerk.*

UNITED STATES OF AMERICA, *Eastern District of Pennsylvania, ss:*

I, Henry B. Robb, clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of the United States of America against the Central Railroad Company of New Jersey, # 89, April session, 1908, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this twenty-ninth day of April, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States the one hundred and thirty-fourth.

[SEAL.] HENRY B. ROBB, *Clerk of C. C.*

(Indorsement on cover:) File No. 22147. E. Pennsylvania. C. C. U. S. Term No. 921. The United States of America, appellant, vs. The Central Railroad Company of New Jersey. Filed May 7th, 1910. File No. 22147.

○

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, [redacted] 1910.

No. [redacted]589

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED MAY 7, 1910.

(22148)

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1909.

No. 922.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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1 APRIL SESSION, 1908.

Charles J. Bonaparte,
95
Robert W. deForrest,
John G. Johnson.

United States of America
vs.
The Pennsylvania Railroad Company.

1908, June 5. Bill of complaint filed.
1908, June 5. Subpœna issued returnable the first Monday of July.
1908, June 5. Order for the appearance of Robert W. deForrest and John G. Johnson, esquires, for defendant filed.
1908, June 10. Answer filed.
1908, June 15. Printed copy of bill of complaint filed.
1908, June 16. Stipulation of counsel filed.
1908, June 16. Replication filed.
1908, June 16. Argued.
1908, June 17. Ordered that defendant file brief by June 25, 1908, and that complainant filed reply brief by July 1, 1908.
1908, September 10. Opinion dismissing bill in equity filed.
1908, October 6. Dissenting opinion by Buffington, J., filed.
Decree dismissing bill of complaint filed.
Assignments of error filed.
Petition for appeal filed.
Order allowing appeal filed.
Citation allowed and issued.
Citation returned "service accepted" and filed.

2 No. 95. April sessions, 1908. In equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT.

Bill of complaint.

(Filed June 5, 1908, Henry B. Robb, clerk. By L., deputy clerk.)

4 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT.

April sessions, 1908. No. 95. In equity.

To the Honorable, the Judges of said Court:

The United States of America, by Charles J. Bonaparte, its Attorney-General, brings this, its bill of complaint, against The Pennsyl-

vania Railroad Company, a railroad company hereinafter more particularly described. And therefore your orator complains and says:

(1) That the said "The Pennsylvania Railroad Company," herein designated and called "the defendant," is a corporation created, organized, and existing under the laws of the State of Pennsylvania, having its principal office in that State, at the city of Philadelphia, and has been such corporation since long before the first day of May, in the year nineteen hundred and eight.

(2) That the defendant is, and has been during its corporate existence, a railroad company now, and for some time past, operating, with its branches and connections, a railroad whose lines extend through parts of the States of Pennsylvania, New Jersey, New York, and other States. That it is, and has been since long before the said first day of May, in the year nineteen hundred and eight, a common carrier within the meaning of an act of the Congress of the United States, approved February 4, 1887, entitled "An act to regulate commerce," and of all acts supplementary thereto or amendatory thereof; and that, as such common carrier, it is, and has been through all the period aforesaid, engaged in interstate transportation, particularly in the transportation, in interstate commerce, of the article or commodity known as "anthracite coal" from the mines and the mining lands in the State of Pennsylvania to the markets of other States.

(3) That the defendant is, and has been continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of the entire capital stock of the Summit Branch Mining Company and of the Susquehanna Coal Company, corporations in the said State of Pennsylvania, and that it thus controls, and has been controlling, the election of the directors or managers of said coal companies. That said coal companies hold, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Luzerne, Northumberland, Dauphin, and Schuylkill, in the said State of Pennsylvania; but said coal lands and coal mines are, as they have been continuously since long before said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the direct management of their respective boards of directors, nearly all of whom are, in the case of each of said coal companies, as they have been for some time past, officers of the defendant. That by virtue of the ownership of the entire capital stock of said coal companies by the defendant, as hereinbefore stated, the defendant owns said coal lands and coal mines, and the anthracite coal therein or thereupon and mined, and being mined, therefrom, and has an interest therein; and that, by virtue of the management of said coal companies by certain of the officers of the defendant, as hereinbefore stated, the operations of said coal companies, in the mining of anthracite coal, have been, and are now being, carried on by and under the authority of the defendant.

(4) That, moreover, the defendant is, at the present time, and has been for a period since long before the said first day of May, in the year nineteen hundred and eight, the owner of some part of the capital stock of the Mineral Railroad and Mining Company, a corporation of the said State of Pennsylvania, which holds, by
7 conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the said counties of Luzerne, Northumberland, Dauphin and Schuylkill, which said coal lands and coal mines are being operated, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, in the mining of anthracite coal, by and under the direct management of a board of directors nearly all of whom are, as they have been for some time past, officers of the defendant. That, by virtue of such stock ownership, the defendant owns in part, and has an interest in, said last mentioned coal lands and coal mines and the anthracite coal therein or thereupon and mined, and being mined, therefrom; and that, by virtue of the management of said last mentioned coal company by officers of the defendant, as hereinbefore stated, the operations of said last mentioned coal company, in the mining of anthracite coal, are being carried on, as they have been in the past, by and under the authority of the defendant.

(5) That from time to time since the first day of May, in the year nineteen hundred and eight, and at the present time, of the anthracite coal so mined and being mined, as aforesaid, there has been, and there is being, loaded at, or near, the mines and lands from which said coal has been, and is being, mined as aforesaid, and within the counties aforesaid, upon the cars of the defendant, for
8 transportation in interstate commerce, a large quantity, the number of tons whereof being to your orator unknown; that such large quantity of coal, when so loaded as aforesaid, has been, and is being, carried and transported in the cars aforesaid, over and upon the said railroad, and its branches and connections, of the defendant, and through and over territory of the said State of Pennsylvania within the jurisdiction of this court, and from the said State of Pennsylvania, by continuous carriage, in interstate commerce, across the boundary line of the said State of Pennsylvania to and into the States of New York, New Jersey and other States for sale and delivery at the markets of the said States of New Jersey, New York and other States; and that such large quantity of anthracite coal, so transported as aforesaid, was not, and is not, necessary and intended for the use of the defendant in the conduct of its business as a common carrier.

(6) That, the defendant being the owner, and part owner, of the anthracite coal mined, and being mined, and transported, and being transported, as aforesaid, and such coal having been, and being, mined by the defendant, and under its authority, as aforesaid, and the defendant having an interest in said coal as aforesaid, the trans-

portation of said coal as aforesaid was, has been, and is, unlawful, being a failure to comply with, and a violation of, the fifth paragraph of the first section of said "Act to regulate commerce" as said
9 section was amended by an act of the Congress of the United States, approved June 29, 1906, which prescribes:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

(7) That not only is said anthracite coal now being mined by and under the authority of the defendant and loaded on the cars of the defendant for transportation in interstate commerce, as hereinbefore set forth, but it will be so mined and loaded in the future; and that it is the purpose of the defendant to continue the same unlawful transportation of said coal, so to be mined and loaded upon the cars of the defendant as aforesaid, as has been hereinbefore described, in violation of the law hereinbefore quoted.

(8) And so your orator says that the anthracite coal so as aforesaid being unlawfully transported by the defendant in interstate commerce, and the anthracite coal which it is the purpose of
10 the defendant to continue to so unlawfully transport as aforesaid, in violation of the law hereinbefore quoted, is, and will be, "an article or commodity, other than timber and the manufactured products thereof, manufactured, mined or produced by it, or under its authority," and, also, such "article or commodity" owned by it "in whole, or in part," and is, likewise, "an article or commodity, other than timber and the manufactured products thereof," in which it has, and will have, an "interest direct or indirect;" and is not "an article or commodity" "necessary and intended," or which will be necessary and intended, "for its use in the conduct of its business as a common carrier."

To the end, therefore, that your orator may have that relief which it can only obtain in a court of equity; that the said defendant, "The Pennsylvania Railroad Company," may make full answer under oath to all the allegations herein: and that an injunction be granted to enjoin and prohibit the said "The Pennsylvania Railroad Company" from further transporting, in interstate commerce, the anthracite coal which it is the purpose of the said defendant to transport, as hereinbefore stated, in violation of the law hereinbefore quoted; and that your orator may have such further or other relief in the premises as the nature and circumstances of the case may require.

May it please your honors to grant to your orator a writ of
11 subpœna, to be directed to the said "The Pennsylvania Railroad Company," thereby commanding it, at a certain time therein to be limited, personally to appear before this honorable court and then and there full, true, direct and perfect answer make to all and singular the premises, and to perform and abide by such order, direction and decree as may be made against it in the premises, and as shall seem meet and agreeable to equity.

And your orator will ever pray.

CHARLES J. BONAPARTE,
Attorney General.

14 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA *vs.* PENNSYLVANIA R. R. COMPANY.	April session, 1908. No. 95.

Enter our appearance for defendant in the above case. June 5th, 1908.

ROBERT W. DE FORREST,
JOHN G. JOHNSON,
per F. MARKO RIVINUS,
Attorneys for Defendant.

To clerk of said court.

(Endorsed:) U. S. C. C., E. D. of Penna., No. 95, April session, 1908. U. S. of America *v.* Pennsylvania R. R. Company. Order for appearance. Filed June 5, 1908. Henry B. Robb, clerk. By L., deputy clerk. Robert W. de Forrest, John G. Johnson, attorneys for defendant.

15 No. 95. April sessions, 1908.

In the Circuit Court of the United States, Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA, COMPLAINANT. *vs.* THE PENNSYLVANIA RAILROAD COMPANY, defendant.	Bill in equity.

Answer of the Pennsylvania Railroad Company.

FRANCIS I. GOWEN,
GEO. V. MASSEY,
Solicitors for Defendant.

(Filed June 10, 1908. Henry B. Robb, clerk. By L., deputy clerk.)

17 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA, complainant, *vs.* THE PENNSYLVANIA RAILROAD COMPANY, defendant.	April sessions, 1908. No. 95. Bill in equity.

Answer of the Pennsylvania Railroad Company.

The Pennsylvania Railroad Company, the defendant in the above bill of complaint, expressly saving and reserving to itself all benefit and advantage of exception to the manifold errors, uncertainties, and insufficiencies in said bill of complaint contained for answer thereto, or to such parts thereof as it is advised it is material and necessary to answer, says:

1. This defendant admits the averments of paragraph 1 of the bill, and further states that it was incorporated by, and duly organized under an act of the State of Pennsylvania entitled "An act to incorporate the Pennsylvania Railroad Company," approved April 13, 1846. This defendant avers that it is duly possessed of and
18 may lawfully exercise all and every the corporate rights, powers, privileges, and franchises mentioned in and conferred by the said act, and by divers other acts supplementary to and amendatory thereof, subsequently from time to time enacted, and also an act entitled, "An act for the sale of the main line of public works," approved May 16, 1857, to all of which it prays leave to refer at the hearing of this cause, with the same force and effect as if the same were herein set out at length.

In addition to the powers conferred in and by the said aforementioned acts, this defendant avers that it has been, and still is, possessed of all the powers, privileges, and rights conferred by two general statutes of the said State, entitled respectively "An act to authorize incorporated companies to invest and reinvest surplus funds in mortgages, stocks and other securities, and fixing the time for holding elections for directors," approved March 31, 1868, and "An act to authorize railroad and canal companies to aid in the development of coal, iron, lumber and other material interests of this Commonwealth," approved April 15, 1869, to each of which acts it prays leave to refer at the hearing of this cause, as fully to all intents and purposes as if the same were herein set forth at length.

2. This defendant admits that it is now, and has been for many years past, engaged in operating lines of railroad in the States of Pennsylvania and New Jersey, and also a line of railroad in the State of New York, and that prior to the first day of May, 1908, it was engaged as a common carrier, within the meaning of the act to regulate commerce, in interstate transportation, and in such transportation, has, *inter alia*, for a long time past transported on and over its

lines of railroad anthracite coal from mines within the State of Pennsylvania to markets in other States, and that it is still engaged in such transportation.

3. This defendant admits that it is, as alleged in paragraph
19 3 of the bill of complaint, the owner of the entire capital stock—consisting of twenty-one thousand three hundred and sixty-eight (21,368) shares of the par value of one hundred dollars ($100), and aggregating at such par value two million one hundred and thirty-six thousand eight hundred dollars ($2,136,800)—of the Susquehanna Coal Company, a corporation of the State of Pennsylvania created and organized under a special statute of said State entitled "An act to incorporate the Pittston Railroad and Coal Company," approved April 11th, 1867, and, by virtue of said act and two additional acts, approved respectively February 24th, 1869, and June 14th, 1873, authorized to acquire, own, and operate coal lands in the county of Luzerne in said State; that this defendant, on the thirty-first day of December, 1873, acquired ten thousand (10,000) shares of the said coal company's stock—the whole whereof then issued and outstanding was fifteen thousand (15,000) shares—and, at divers times subsequently, and until and inclusive of the fifth day of January, 1886, from time to time made purchases and acquisition of the additional shares.

This defendant also admits that it is, as stated in said paragraph 3 of the bill of complaint, the owner of the whole capital stock—consisting of five hundred (500) shares of the par value of fifty dollars ($50) each, and aggregating at such par value twenty-five thousand dollars ($25,000)—of the Summit Branch Mining Company, a coal mining corporation duly constituted under the laws of the State of Pennsylvania by the purchasers at judicial sale of the corporate property and franchises of the Summit Branch Coal Company, which latter was likewise a corporation duly constituted under the laws of the State of Pennsylvania by the purchasers at judicial sale of the corporate property and franchises of the Summit Branch Railroad Company, and the said Summit Branch Railroad Company was duly constituted under and by virtue of "An act to incorporate the Summit Branch Railroad Company in Dauphin and Schuylkill counties,"
approved March 20th, 1846, and several supplements thereto
20 approved respectively February 12th, 1850, March 30th, 1853, and March 23rd, 1860, and was possessed of the corporate rights, privileges, and franchises conferred by said several acts, as well as by an act entitled "An act relating to the Summit Branch and Millersburg and Rousch Gap Railroad Companies," approved March 1st, 1866. This defendant became the owner, in 1871, of shares of the capital stock of said Summit Branch Railroad Company aggregating at their par value one million two hundred and fifty-two thousand four hundred dollars ($1,252,400), and subsequently and until and inclusive of the year 1899 from time to time made purchases of additional shares thereof. That the said last-mentioned coal company is authorized to acquire, by purchase or lease, coal

lands in the counties of Dauphin and Schuylkill in the said State of Pennsylvania, and has acquired such lands which are principally situated and operated in the said county of Dauphin.

This defendant further admits that it is, as alleged in paragraph 4 of said bill of complaint, the owner of one thousand six hundred and sixty-seven (1,667) shares, out of a total of five thousand and one (5,001) shares issued and outstanding, of the capital stock of the Mineral Railroad and Mining Company, also a corporation of the State of Pennsylvania created by and under two special statutes of said State, to wit: "An act to incorporate the Mineral Railroad and Mining Company" (public laws 1865, page 959) and "An act to authorize the Mineral Railroad and Mining Company to lease certain coal lands," approved April 1st, 1872; and that said last-mentioned company is authorized to acquire, own, and operate coal lands in the county of Northumberland in said State.

This defendant further states and avers that it became the lawful owner of the shares of each of the said three coal companies, as hereinabove stated, many years prior to the enactment of the act of Congress entitled "An act to amend an act to regulate commerce, approved February 1st, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29th, 1906.

21 This defendant further admits, as alleged in said paragraphs 3 and 4 of the bill of complaint, that each of the above-mentioned coal companies holds, under conveyances and leases made long prior to the said first day of May, 1908, anthracite coal lands situate in what is known as the "anthracite coal regions" of Pennsylvania, and located in the counties respectively as herein above stated, and that said companies have been, from a date long prior to the said first day of May, 1908, engaged in mining anthracite coal thereon and therefrom, such mining operations being carried on under the immediate and direct control of the executive officers of the respective companies, these, in their turn, being subject to the supervisory power and control vested in the boards of directors of the said companies by their respective charters.

The actual operations of the said coal companies, insofar as these relate to or have to do with the mining, shipping, selling, and marketing of the coal mined by the said companies, respectively, are, as this defendant is informed and believes and so avers, directed and controlled by the president and vice-president of said companies and the officers and agents subordinate to and appointed by them, and this defendant avers that, neither at the present time nor for many years past, have either the said president or vice-president of said coal companies, or any of the subordinate officers or agents appointed by them, been an officer or agent of this company, or in any wise subject to the orders or directions of this defendant.

And this defendant admits that, at the present time and for many years past, a majority of the board of directors of each of the said coal companies have been either officers or directors of this defendant.

This defendant denies that, because or by virtue of its ownership of the aforesaid shares of stock of the said several coal companies, it has become the owner of the coal lands and coal mines, title to which is in the said companies, respectively, or of the coal therein or mined therefrom, or that it has any interest in said lands, mines
22 or coal; or that, by virtue of its ownership of the shares of stocks of the said several coal companies and the voting power incident thereto in the election of the managers or directors of each of said companies, and such other officers (if any) as, under the charter of each company, are elected by the stockholders, the operations of said coal companies, or any of them, in the mining of anthracite coal, are being carried on by and under the authority of this defendant.

4. This defendant admits that from time to time since the first day of May, 1908, and at the present time anthracite coals produced from mines of the several coal companies heretofore mentioned—a portion whereof is sold before, and a portion after, the transportation thereof begins—have been transported and are still being transported at lawfully established schedule rates on and over its lines of railroad, and that a considerable portion—approximately sixty-five per centum (65%) of the coal so mined—is carried to different destinations outside the State of Pennsylvania, and that the transportation of such portion thereof by this defendant constitutes commerce between different States, and it also admits that the coal thus transported was not, and is not, necessary nor intended for the use of the defendant in the conduct of its business as a common carrier.

5. This defendant denies the correctness of the conclusions of law stated in paragraph 6 of the bill. Under advice of counsel, it denies that it results from its ownership of the shares of stock of the aforesaid coal companies, that the anthracite coals mined or produced from the mines of said coal companies have been or are being mined or produced by it or under its authority, or that it has any interest, direct or indirect, therein, within the purview, meaning, and intent of the clause of the act of Congress approved June 29, 1906, which is set out in paragraph 6 of the bill; but, on the contrary, it states and avers that it has, and can have no interest or benefit in the operation of said companies other than that of receiving such portion of
23 the clear profits of each as may be by the board of directors of each of said companies from time to time declared as dividends, and allotted to this defendant according to its ownership of the capital stock of each thereof.

6. This defendant admits that it is now engaged in the interstate transportation of anthracite coal mined by the aforesaid coal companies, and that it is its purpose to continue such transportation unless it should be required to desist from the same by the order of this honorable court, but it denies that in so doing it is acting in violation of law.

7. This defendant admits that anthracite coal is an article or commodity other than timber and the manufactured products thereof, as

averred in paragraph 8 of the bill, but it denies, under the advice of counsel, that any coal which it transports other than that which may be intended for its use in the conduct of its business as a common carrier, is either owned by it in whole or in part, or that it has any interest, direct or indirect, therein.

And this defendant, further answering, says that the mining and production of anthracite coal is confined to the State of Pennsylvania, as no deposits of this coal have as yet been found outside of the limits of that State which at the present time are being worked. That the said coal is almost the exclusive domestic fuel for large portions of the States of New York, New Jersey, Delaware, Maryland, and for many of the New England States, and that the transportation of such coal into these States has been carried on for many years past.

That in the year 1907 more than sixty-eight million gross tons of anthracite coal were mined in the State of Pennsylvania, and that approximately forty-five million tons were transported to and consumed at points outside of the State of Pennsylvania. That anthracite coal has thus become a very considerable increment in interstate commerce exceedingly important, and highly essential to the public welfare; and that any interference with or interruption of the movement of such coal to points of consumption outside
24 the State would be a serious inconvenience and detriment to a large portion of the inhabitants of the States to which anthracite coal is now transported.

That a very large proportion of the anthracite coals produced from the properties of the aforesaid coal companies has been continuously transported either wholly or partly to its destined markets over the railroads of this defendant, and that many of the said properties and the most largely producing of them are located either directly upon or so contiguous to railroads operated or controlled by this defendant as to make said railroads the only reasonably practical and conveniently available avenues of transportation whereby the coals produced therefrom can be, as they now are and heretofore have been, transported to and delivered at accustomed markets and other points of consumption for manufacturing, domestic and transportation uses, both without and within the State of Pennsylvania.

9. This defendant, while insisting that the interstate transportation of coal by it, which has been mined or produced by the aforesaid coal companies, is not prohibited by the act of Congress approved June 29, 1906, further states and shows to the court that the clause of said act which it is averred it has violated because of the interstate transportation of such coal, is violative of and repugnant to the Constitution of the United States in the following particulars:

(*a*) That it does not permit and undertake to regulate the transportation in interstate commerce of anthracite coals produced from the mines of the several companies hereinbefore mentioned; but, on the contrary, undertakes to absolutely *prohibit* transportation thereof, and therefore is not a "*regulation*" of interstate commerce,

but a "*prohibition*" of such commerce; and consequently is not within the scope of the commerce clause of the Constitution.

(*b*) That the effect of the said clause will constitute a taking of the defendant's property, corporate rights, and franchises without due process of law and without compensation, and that in its result this defendant will be denied the equal protection of the laws.

25 (*c*) That said clause is "class legislation," unduly and unjustly discriminative in its results in that it expressly permits railroad companies to transport in interstate commerce timber and the manufactured products thereof, which may be manufactured or produced by any such company, or under its authority; or which it may own in whole or in part, or in which it may have any interest, direct or indirect; and prohibits transportation in interstate commerce of other commodities, including anthracite coals—an increment in such commerce exceedingly important and highly essential to the public welfare; and is also unjustly discriminative "class legislation," in that it arbitrarily denies to one class of common carriers under the act to regulate commerce and its several amendments the right and privilege of transportation of certain commodities but imposes no such restriction or prohibition on other common carriers under said act and its amendments.

(*d*) That the penalties imposed by the statute for violations thereof are of such magnitude, and so unduly excessive and extortionate, as to be substantially destructive of the property and franchises of the carriers affected thereby, and in respect to such carriers to constitute a denial of the equal protection of the law.

And this defendant having fully answered all material allegations in said bill of complaint contained, prays that it may be hence dismissed with its reasonable costs in this behalf most wrongfully sustained.

THE PENNSYLVANIA RAILROAD COMPANY,
By JAMES MCCREA, *President.*

Attest:
[SEAL.]

LEWIS NEILSON,
Secretary.

FRANCIS I. GOWEN,
GEO. V. MASSEY,
Solicitors for Defendant.

26 STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Be it remembered that on this ninth day of June, A. D. 1908, personally appeared before me, the undersigned, a notary public of the State of Pennsylvania, in the said county of Philadelphia, James McCrea, who having been by me duly sworn according to law, deposes and says that he is the president of The Pennsylvania Railroad Company, and that the facts set forth in the foregoing answer of

said company are correctly and truly stated according to the best of his knowledge, information and belief.

JAMES MCCREA.

Sworn to and subscribed before me the day and year aforesaid, as witness my hand and official seal hereto affixed.

[SEAL.] A. J. COUNTY,
Notary Public.

My commission expires January 21st, 1909.

31 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *vs.* THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT.	April - session, 1908. No. 95. In equity.

It is stipulated and agreed between counsel in the above cause that its submission on bill and answer and any averment or admission in the pleading of either party contained shall in no wise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted and shall be operative and take effect only with respect to the present suit and for the purposes thereof.

CHARLES J. BONAPARTE,
Attorney-General.
JOHN G. JOHNSON,
Atty. for Deft.
ROBERT W. DE FORREST,
Atty. for Deft.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 95. April session, 1908. Equity. U. S. v. The Pennsylvania Railroad Company. Stipulation of counsel. Filed June 16, 1908. Henry B. Robb, clerk, L.

32 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *vs.* THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT.	April session, 1908. No. 95. In equity.

The complainant in this cause hereby joins issue with the defendant, The Pennsylvania Railroad Company, and will submit the cause, by permission of the court, on bill, answer and the stipulation and agreement between counsel in said cause filed.

CHARLES J. BONAPARTE,
Attorney-General.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 95. April session, 1908. Equity. U. S. v. The Pennsylvania Railroad Company. Replication. Filed June 16, 1908. Henry B. Robb, clerk. L.

[NOTE.—Here follow opinions, which are omitted in printing this record by stipulation of counsel. The opinions will be found printed in the record of the case of the United States ex rel. the Attorney-General of the United States, plaintiff in error, vs. the Delaware, Lackawanna and Western Railroad Company, No. 562, of October Term, 1908. vs. Lehigh Co. No. 91 Oct. 1908.)

109 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
vs.
PENNSYLVANIA RAILROAD COMPANY. } April sessions, 1908. In Equity. No. 95.

Before DALLAS, C. J.

And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penn. No. 95. U. S. vs. Pennsylvania Railroad Company. Decree dismissing bill. Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

110 No. 95. April session, 1908. In equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT.

Now comes the complainant, the United States of America, through Charles J. Bonaparte, Attorney-General of the United States, and makes and files, on behalf of said United States, its assignment of errors, upon which it will rely upon its appeal to the Supreme Court of the United States from the judgment and decree made and entered in this case by the Circuit Court of the United States for the Eastern District of Pennsylvania, on the sixth day of October, in the year nineteen hundred and eight, that is to say:

1. That the Circuit Court erred in dismissing the bill of complaint in this case.

2. That the Circuit Court erred in refusing the injunction prayed in this case.

3. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States.

4. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities
111 clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States in so far as it affects the transportation of property owned, acquired, manufactured, mined, or produced by the defendant prior to the enactment of the said so-called "commodities clause."

5. That the Circuit Court erred in holding that the said co-called "commodities clause" is not a regulation of interstate commerce within the true meaning of the third clause of the eighth section of article one of the Constitution of the United States.

6. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, deprives the defendant of its property in violation of the fifth amendment of the Constitution.

7. That the Circuit Court erred in holding that the said so-called "commodities clause" constitutes a prohibition and not a regulation of interstate commerce and, as such, exceeds the constitutional powers of the Congress conferred by the third clause of the eighth section of article one of the Constitution of the United States.

8. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, is discriminative in its provisions, and, therefore, constitutionally invalid.

9. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, constitutes an attempt to deprive the defendant of the right to use and enjoy its private property, and, as such, is incompatible with free government and inconsistent with the constitutional prohibitions against taking private property for public use without just compensation and depriving any person of liberty or property without due process of law.

112 10. That the Circuit Court erred in sustaining the objections raised by the defendant's answer to the constitutional validity of the so-called "commodities clause," the legislation above mentioned, and in not overruling each and all of the said objections.

Wherefore the said complainant and petitioner prays that the said judgment and decree of the Circuit Court of the United States for the Eastern District of Pennsylvania be reversed.

CHARLES J. BONAPARTE,
Attorney-General.

J. WHITAKER THOMPSON,
United States Attorney.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 95. April session, 1908. In Equity. United States of America vs. The Pennsylvania Railroad Company. Assignment of errors. Filed October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

113 No. 95. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT.

To the honorable, the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

The United States of America, through Charles J. Bonaparte, Attorney-General of the United States, feeling itself aggrieved by the judgment and decree entered in the above-entitled case, on the sixth day of October, in the year nineteen hundred and eight, does hereby appeal from said judgment and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said judgment and decree was made duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES J. BONAPARTE,
Attorney-General.

J. WHITAKER THOMPSON,
United States Attorney.

Dated, October sixth, 1908.

114 (Endorsed:) U. S. C. C., E. D. of Penna. No. 95. April session, 1908. In Equity. United States of America *vs.* The Pennsylvania Railroad Company. Petition for appeal. The clerk will please file within petition for appeal, the assignment of errors herewith, and order of court allowing appeal when granted. Charles J. Bonaparte, Attorney-General, J. Whitaker Thompson, U. S. attorney. Filed, October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

115 No. 95. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT.
vs.
THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT.

Before DALLAS, C. J.

It is hereby ordered that the appeal in the above-entitled case to the Supreme Court of the United States be and is hereby allowed as prayed.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penna. No. 95. April session, 1908. In Equity. United States of America *vs.* The Pennsylvania Railroad Company. Order of court allowing appeal. Filed, October 6th, 1908. Henry B. Robb, clerk. By L., deputy clerk.

116 UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Pennsylvania Railroad Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington within thirty days, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein United States of America is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable George M. Dallas, judge of the Circuit Court of the United States, this sixth day of October, in the year of our Lord one thousand nine hundred and eight.

BY THE COURT.

Service accepted.

JOHN G. JOHNSON,
Per J. W. BAYARD,
Attorney for Appellee.

Attest:

HENRY B. ROBB,
Clerk.

117 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set.

I, Henry B. Robb, clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of United States of America *v.* The Pennsylvania Railroad Company, No. 95, April session, 1908, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this seventh day of October, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-third.

[SEAL.]

HENRY B. ROBB,
Clerk of C. C.

Indorsement on cover: File No. 21365. E. Pennsylvania, C. C. U. S. Term No. 569. The United States of America, Appellant, *vs.* The Pennsylvania Railroad Company. Filed, October 10th, 1908. File No. 21365.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct.

I, Henry B. Robb, clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of United States of America *v.* The Pennsylvania Railroad Company, No. 95, April session, 1908, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this seventh day of October, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-third.

[SEAL.] HENRY B. ROBB,
Clerk of C. C.

Indorsement on cover: File No. 21365. E. Pennsylvania, C. C. U. S. Term No. 569. The United States of America, Appellant, *vs.* The Pennsylvania Railroad Company. Filed, October 10th, 1908. File No. 21365.

1908, Oct. 7. Record transmitted to U. S. Supreme Court.

1910, Feb. 22. Mandate received from U. S. Supreme Court ordering that the decree of this court be and the same is hereby reversed, &c., and filed.

1910, Feb. 25. Argued sur motion for settlement of decree.

1910, Mar. 7. Decree reinstating cause filed. Decree denying motion of complainant to dismiss bill of complaint without prejudice filed. Decree dismissing bill filed.

1910, Apr. 29. Assignments of error filed. Petition for appeal filed. Order allowing appeal filed. Citation allowed and issued. Citation returned " service accepted " and filed.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, greeting:

Whereas, lately in the Circuit Court of the United States for the Eastern District of Pennsylvania, before you or some of you, in a cause between the United States of America, complainant, and The Pennsylvania Railroad Company, defendant, wherein the decree of the said Circuit Court, entered in said cause on the 6th day of October, A. D. 1908, is in the following words, viz: "And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed," as by the inspection of the transcript of the record of said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal agree-

ably to Congress, in such case made and provided, fully and at large appears;

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and eight, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings in conformity with the opinion of this court.

MAY 3, 1909.

You therefore are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of June, in the year of our Lord one thousand nine hundred and nine.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

(Endorsed:) 95. Apr. S., 1908. File No., 21365. Supreme Court of the United States. No. 569. October term, 1908. The United States of America vs. Pennsylvania Railroad Company. Mandate. Filed Feb. 22, 1910. Henry B. Robb, clerk, by L., deputy clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
v.
THE PENNSYLVANIA RAILROAD COMPANY. } April sessions, 1908. In equity, No. 95.

Before Gray, Buffington, and Lanning, J. J.

Whereas in the above-entitled cause the following decree was entered in this court on October 6, 1908: "And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed;" and

Whereas the said decree was taken to the Supreme Court of the United States by an appeal; and

Whereas on the 3d day of May, 1909, a decree was entered in the said Supreme Court in the following words: "It is now here ordered, adjudged, and decreed by this court that the decree of the said

Circuit Court in this cause be, and the same is hereby, reversed. And it is further ordered that this cause be, and the same is hereby, remanded to the Circuit Court for further proceedings in conformity with the opinion of this court;" and

Whereas the mandate of that court issued on the 17th day of June, 1909, and has been called to the attention of this court;

Now, therefore, it is ordered that the decree of this court entered October 6, 1908, dismissing the bill herein, be set aside, and the cause be reinstated upon the docket of this court.

Dated March 7, 1910.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Indorsed:) No. 95. Apr. sess., 1908. In the Circuit Court of the United States, Eastern District of Pennsylvania. In equity. United States of America v. The Pennsylvania Railroad Company. Decree reinstating cause.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
v.
THE PENNSYLVANIA RAILROAD COMPANY. } April sessions, 1908. In equity, No. 95.

Before Gray, Buffington, and Lanning, J. J.

Whereas in the above-entitled cause the following decree was entered in this court on October 6, 1908: "And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed;" and

Whereas the said decree was taken to the Supreme Court of the United States by an appeal; and

Whereas on the 3d day of May, 1909, a decree was entered in the said Supreme Court in the following words: "It is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed. And it is further ordered that this cause be, and the same is hereby, remanded to the Circuit Court for further proceedings in conformity with the opinion of this court;" and

Whereas the mandate of that court issued on the 17th day of June, 1909, and has been called to the attention of this court; and

Whereas upon motion of the complainant the cause was reinstated upon the docket of this court; and

Whereas said complainant then moved that said decree of dismissal entered October 6, 1908, be changed to read, "And now, the sixth day of October, nineteen hundred and eight, the above cause

having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed without prejudice," and counsel having been heard on said motion; and

Whereas it appears to the court upon the pleadings that the defendant, The Pennsylvania Railroad Company, is not transporting in interstate commerce from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any coal which has been mined, manufactured, or produced by it, and which it owns in whole or in part at the time of transportation, except such coal as is necessary and intended for its use in the conduct of its business as a common carrier, and in the opinion of the court is not violating the "Commodities clause" within the meaning of the clause as construed by the Supreme Court;

Now, therefore, it is ordered that said motion be denied.

Dated March 7, 1910.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Indorsed:) No. 95. Apr. sess., 1908. In the Circuit Court of the United States, Eastern District of Pennsylvania. In equity. United States of America v. The Pennsylvania Railroad Company. Decree denying motion of complainant to dismiss bill of complaint without prejudice.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
v.
THE PENNSYLVANIA RAILROAD COMPANY. } April sessions, 1908. In equity. No. 95.

Before Gray, Buffington, and Lanning, J. J.

Whereas in the above-entitled cause the following decree was entered in this court on October 6, 1908: "And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed;" and

Whereas the said decree was taken to the Supreme Court of the United States by an appeal; and

Whereas on the 3d day of May, 1909, a decree was entered in the said Supreme Court in the following words: "It is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed. And it is further ordered that this cause be, and the same is hereby, remanded to the Circuit Court for further proceedings in conformity with the opinion of this court;" and

Whereas the mandate to this court issued on the 17th day of June, 1909, and has been called to the attention of the court; and

Whereas, referring to the said opinion of the Supreme Court of the United States and in conformity thereto, it appears upon the pleadings in this cause, that the defendant Pennsylvania Railroad Company is not transporting in interstate commerce from any State, Territory, or the District of Columbia, to any State, Territory, or the District of Columbia, or to any foreign country, any coal which has been mined, manufactured, or produced by it, and which it owned in whole or in part at the time of transportation, except such coal as is necessary and intended for its use in the conduct of its business as a common carrier;

And whereas the Attorney-General of the United States has moved for the entry of a decree dismissing the bill without prejudice, and said motion has been opposed by the defendant, and the court has denied the motion;

And whereas the Attorney-General has declared, his motion to dismiss without prejudice having been denied, that he intends to proceed no further in this court in this cause.

It is therefore on motion of counsel for the defendant ordered and decreed that the bill be, and the same is hereby, dismissed.

Dated March 7, 1910.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Indorsed:) No. 95. Apr. sess., 1908. In the Circuit Court of the United States, Eastern District of Pennsylvania. In equity. United States of America v. The Pennsylvania Railroad Company. Decree dismissing bill.

Equity, No. 95.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Pennsylvania Railroad Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, D. C., within thirty days, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States for the Eastern District of Pennsylvania, wherein United States of America is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. M. Lanning, judge of the Circuit Court of the United States for the Eastern District of Pennsylvania, the 29th day of April, in the year of our Lord nineteen hundred and ten (1910).

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

Service accepted.

JOHN G. JOHNSON,
Attorney for Appellee.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, complainant, *vs.* THE PENNSYLVANIA RAILROAD COMPANY, defendant.	In equity. 1980.	April sessions, No. 95.

To the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania.

The United States of America, through William S. Kenyon, assistant to the Attorney-General of the United States, feeling itself aggrieved by the judgment and decree entered in the above-entitled cause on the seventh day of March, in the year nineteen hundred and ten, does hereby appeal from said judgment and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

April 29th, 1910.

WILLIAM S. KENYON,
Assistant to the Attorney-General.

EDWIN P. GROSVENOR,
Special Assistant to the Attorney-General.

J. WHITAKER THOMPSON,
United States Attorney.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, complainant, *vs.* THE PENNSYLVANIA RAILROAD COMPANY, defendant.	In equity. April sessions, 1908. No. 95.

Before Lanning, C. J.

It is hereby ordered that the appeal in the above entitled case to the Supreme Court of the United States be and is hereby allowed as prayed.

W. M. LANNING, *Circuit Judge.*
BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA, petitioner, *vs.* THE PENNSYLVANIA RAILROAD COMPANY, defendant.	In equity. April sessions, 1908. No. 95.

Before Gray, Buffington, and Lanning, circuit judges.

Comes now the United States of America, by counsel, and in connection with its petition for appeal to the Supreme Court of the United States from the decree of the Circuit Court of the United States for the Eastern District of Pennsylvania entered herein on the seventh day of March, 1910, dismissing absolutely the bill of complaint herein, makes and files the following assignment of errors.

I.

The complainant having filed a bill of complaint praying an injunction under the fifth paragraph of the first section of the act to regulate commerce as amended by the act approved June 29, 1906, commonly called the "Commodities clause," in which bill it was stated in effect that the Pennsylvania Railroad Company was transporting certain coal in violation of the commodities clause, and such proceedings having been had in said Circuit Court, that said bill was dismissed by the Circuit Court on the ground that said act of Congress was unconstitutional and void, and complainant having prosecuted an appeal to the United States Supreme Court, and that court having construed said act, and having held it to be constitutional as so construed, and having remanded the case to the court below for

further proceedings in conformity with the opinion of the Supreme Court, and the complainant on the filing of the mandate in the court below, and on the reinstatement of the case in that court having moved that the court dismiss the complaint without prejudice, the Circuit Court erred in denying said motion of complainant.

II.

The complainant having filed a bill of complaint praying an injunction under the fifth paragraph of the first section of the act to regulate commerce as amended by the act approved June 29, 1906, commonly called the "Commodities clause," in which bill it was stated in effect that the Pennsylvania Railroad Company was transporting certain coal in violation of the commodities clause, and such proceedings having been had in said Circuit Court, that said bill was dismissed by the Circuit Court on the ground that said act of Congress was unconstitutional and void, and complainant having prosecuted an appeal to the United States Supreme Court, and that court having construed said act, and having held it to be constitutional as so construed, and having remanded the case to the court below for further proceedings in conformity with the opinion of the Supreme Court, and the complainant on the filing of the mandate in the court below, and on the reinstatement of the case in that court having moved that the court dismiss the complaint without prejudice and the court having denied said motion to dismiss without prejudice, and the defendant then having moved the court to dismiss the bill of complaint absolutely, said Circuit Court erred in dismissing said bill of complaint absolutely.

III.

The Circuit Court erred in dismissing the bill of complaint absolutely for that the proceedings herein were commenced with the object and purpose of settling the differences between the complainant and the defendant concerning the meaning of the commodities clause and the power of Congress to enact it as correctly interpreted, and on said appeal to the United States Supreme Court that court construed the commodities clause and held it to be constitutional as so construed, and remanded the case for further proceedings in conformity with its opinion, but as the bill of complaint herein did not state a cause of action within the construction placed upon the commodities clause by the Supreme Court by reason of the omission of certain allegations of fact setting up the relations existing between the defendant and certain coal companies, and accordingly the pleading of complainant was defective, the said bill of complaint should have been dismissed without perjudice, for said dismissal without prejudice would have enabled the complainant to file a new complaint in another action for the same cause of action, whereas the absolute dismissal of the bill by the Circuit Court constitutes a bar to any further litigation of the same subject between the complainant and

the defendant, and accordingly said Circuit Court erred in dismissing the bill of complaint absolutely.

By reason whereof, the United States prays that the said decree dismissing the bill of complaint absolutely herein be reversed.

April 29th, 1910.

WILLIAM S. KENYON,
Assistant to the Attorney-General.
EDWIN P. GROSVENOR,
Special Assistant to the Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

Filed April 29, 1910.

HENRY B. ROBB, *Clerk.*

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

I, Henry B. Robb, clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of the United States of America against the Pennsylvania Railroad Company # 95, April sess., *session*, 1908, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this twenty-ninth day of April, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States the one hundred and thirty-fourth.

[SEAL.]

HENRY B. ROBB, *Clerk of C. C.*

(Indorsement on cover:) File No. 22148. E. Pennsylvania. C. C. U. S. Term No., 922. The United States of America, appellant, vs. The Pennsylvania Railroad Company. Filed May 7th, 1910. File No., 22148.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES OF AMERICA, appellant,
v.
LEHIGH VALLEY RAILROAD COMPANY appellee.
} No. 919.

THE UNITED STATES OF AMERICA, appellant,
v.
ERIE RAILROAD COMPANY, APPELLEE.
} No. 920.

THE UNITED STATES OF AMERICA, appellant,
v.
THE CENTRAL RAILROAD COMPANY OF New Jersey, appellee.
} No. 921.

THE UNITED STATES OF AMERICA, appellant,
v.
THE PENNSYLVANIA RAILROAD COMPANY, appellee.
} No. 922.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

41690—10

MOTION TO ADVANCE.

On behalf of the appellant, the Solicitor-General respectfully moves the court to advance the above-entitled causes, and to assign them for hearing at an early date, for the following reasons:

These are four of six suits in equity which were instituted June 5, 1908, by the United States, in the Circuit Court of the United States for the Eastern District of Pennsylvania, under the "commodities clause" (34 Stat., 584), to enjoin the transportation of coal in violation of that provision of the Hepburn Act. That court dismissed the complaint (164 Fed., 215) and the six cases in equity, with six similar cases at law, were then appealed to this court, which reversed the decrees below (213 U. S., 364). The mandates of this court remanded the causes for "further proceedings in conformity with the opinion of this court." Mr. Justice White concluded his opinion as follows (213 U. S., 418):

> As the court below held the statute wholly void for repugnancy to the Constitution, it follows from the views which we have expressed that the judgments and the decrees entered below must be reversed. As, however, it was conceded in the discussion at bar that in view of the public and private interests which were concerned, the United States did not seek to enforce the penalties of the statute, but commenced these proceedings with the object and purpose of settling the differences between it and the defendants, concerning the meaning of the commodities clause and the power of Con-

> gress to enact it as correctly interpreted, and upon this view the proceedings were heard below by submission upon the pleadings, we are of opinion that the ends of justice will be subserved, not by reversing and remanding with particular directions as to each of the defendants, but *by reversing and remanding with directions for such further proceedings as may be necessary to apply and enforce the statute as we have interpreted it.* (Italics ours.)

When the cases were reinstated in the Circuit Court on the filing of the mandates of this court, the Circuit Court dismissed the bills absolutely in four of the equity cases, and in two cases issued injunctions. From the decrees of absolute dismissal, the United States has taken appeals.

In the case against the Lehigh Valley Railroad Company, No. 919, after the case had been reinstated upon the filing of the mandate, the United States asked leave to file an amended bill of complaint, in order to bring the statement of the cause of action within the interpretation placed upon the commodities clause by this court. When this was denied, the United States moved to be dismissed without prejudice. This was denied and then, on motion of the defendant, the court dismissed the bill absolutely. The appellant contends that this decree of absolute dismissal was not in conformity with the direction of this court contained in its mandate, which remanded the case "for further proceedings in conformity with the opinion of this court."

In the three other cases, Nos. 920, 921, and 922, the United States moved to dismiss without prejudice. These motions were denied, and the court dismissed the bills absolutely.

The decrees of absolute dismissal by the Circuit Court prevent the United States from taking any further proceedings to enforce an observance of the commodities clause on the part of the four railroads, defendants in these actions.

A speedy determination of the lawfulness of the decrees of the Circuit Court is therefore a matter of great public importance.

The Hepburn Act, which amends the original Interstate Commerce Act, provides that a proceeding in equity to enforce any of the provisions of the act to regulate commerce approved February 4, 1887, and all acts amendatory thereof, upon appeal to the Supreme Court of the United States shall have in such court priority in hearing and determination over all other causes except criminal causes.

I am authorized to state that counsel for the appellees concurs in this motion.

LLOYD W. BOWERS,
Solicitor-General.

MAY, 1910.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES OF AMERICA, APPELLANT, *v.* LEHIGH VALLEY RAILROAD COMPANY. } No. 536.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case comes here on appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The suit was instituted June 5, 1908, under the "commodities clause" of the Hepburn Act (34 Stat., 584). The Circuit Court dismissed the complaint (164 Federal, 215) and the case was then appealed to this court, which reversed the decree below on May 3, 1909 (213 United States, 364), and remanded the case "with directions for such further proceedings

as may be necessary to apply and enforce the statute as we have interpreted it." The mandate of this court filed with the clerk of the Circuit Court on February 23, 1910, provided: "It is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings in conformity with the opinion of this court." (Record, p. 139.)

After the case had been reinstated upon the docket of the Circuit Court, the United States moved the court for leave to file an amended bill of complaint (Rec., p. 141). The amended bill of complaint appears in the record at pages 142 to 147. This motion was denied by the court, and thereupon the United States moved for a decree dismissing the bill of complaint without prejudice (Rec., p. 148). This motion was also denied, the court delivering an opinion (Rec., pp. 148 to 151), and thereupon, on motion of counsel for the defendant, the court dismissed the bill of complaint.

This suit was originally instituted in order to determine the constitutionality of the commodities clause and its correct interpretation. This court having construed the statute on the previous appeal, the Government asked leave of the Circuit Court to amend its complaint in order that it might bring the pleadings and the statement of the cause of action within the construction placed upon the commodities clause by the Supreme Court, and thereby obtain the relief to which the United States is entitled under that decision of this court.

At the time this suit was originally instituted the United States, by its Attorney General, filed a petition in mandamus, seeking to accomplish the same result. The two suits were heard together, with ten other suits, five in equity and five by way of mandamus, against five other railroads, namely, Erie Railroad Company, The Central Railroad Company of New Jersey, The Pennsylvania Railroad Company, The Delaware and Hudson Company, and the Delaware, Lackawanna and Western Railroad Company. The allegations of facts stated in each petition of mandamus were essentially the same as in the corresponding bill in equity. After the decision by this court, similar mandates issued in the twelve cases. When the mandates were filed in the Circuit Court that court issued injunctions against the Delaware, Lackawanna and Western Railroad Company and The Delaware and Hudson Company, but dismissed the other cases.

The opinion of this court and the dissenting opinion are printed in full as an appendix to this brief.

The commodities clause is as follows (34 Stat., 584):

> From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined or produced by it, or under its authority, or

> which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

The present Chief Justice, then Mr. Justice White, summarized the decision of this court on the previous appeal as follows (p. 415):

> We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (*a*) When the article or commodity has been manufactured, mined or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (*b*) When the carrier owns the article or commodity to be transported in whole or in part; (*c*) When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder.

The Lehigh Valley Railroad Company does not own any coal mines, but it has stock interests in a number of coal companies in which it owns either all, a majority, or a minority of the stock (Rec., pp. 2–3).

ASSIGNMENTS OF ERROR.

The United States appeals from the decree dismissing absolutely the bill of complaint (record, p. 154) and assigns the following errors (record, pp. 155–159):

I.

The complainant having filed a bill of complaint praying an injunction under the fifth paragraph of the first section of the act to regulate commerce as amended by the act approved June 29, 1906, commonly called the "commodities clause," in which bill it was stated in effect that the Lehigh Valley Railroad Company was transporting certain coal in violation of the commodities clause, and such proceedings having been had in said Circuit Court, that said bill was dismissed by the Circuit Court on the ground that said paragraph of said act of Congress was unconstitutional and void, and complainant having prosecuted an appeal to the United States Supreme Court, and that court having construed said section and having held it to be constitutional as so construed, and having remanded the cause to the court below for further proceedings in conformity with the opinion of the Supreme Court, and the complainant on the filing of the mandate in the court below, and on the reinstatement of the cause in that court having moved the court for permission to file an amended bill of complaint in the cause, which amended bill was for the purpose of supplying certain allegations of fact in the record from which it would appear that the

railroad had a legal or equitable interest in the coal, the original bill having shown only a stock interest by the railroad in the Lehigh Valley Coal Company, the said Circuit Court erred in not granting said motion and in refusing leave to the complainant to file the amended bill of complaint.

II.

The court having denied the motion for permission to file an amended bill of complaint, and the complainant having then moved that the court dismiss the complaint without prejudice, the court erred in denying said motion to dismiss without prejudice.

III.

The Circuit Court erred in dismissing the bill of complaint absolutely.

IV.

The Circuit Court erred in denying the motion for leave to file said amended bill of complaint, for that the denial of said motion made it impossible for the complainant to supply in the record certain allegations of fact which, if pleaded, would have brought the statement of the facts making out the cause of action of the complainant within the construction placed upon the commodities clause by the Supreme Court in its opinion on said appeal, and which facts, if pleaded and proven, would have entitled the complainant to a decree against said defendant, the said

new allegations of fact not stating a new cause of action, but merely supplying in the record certain allegations of fact showing that the carriage of the coal by the defendant is unlawful, said coal being ostensibly owned by the Lehigh Valley Coal Company, but in fact owned by the defendant, legally or equitably, and said new allegations of fact not having been stated in the original complaint for the reason that said act, not having been construed by the Supreme Court, it was considered that an ownership of stock by the railroad in the coal company made the carriage by the railroad of the coal of the coal company unlawful, whereas the purpose of said additional allegations was to show that the coal company is in fact but a department of the railroad, and that while the coal is ostensibly owned by the coal company it is in reality owned by the railroad, legally or equitably, and that therefore the coal company is not a bona fide company within the meaning of that term as used in the opinion of the Supreme Court, and therefore the carriage of the coal by the defendant under the circumstances described in said proposed additional allegations is unlawful.

V.

The Circuit Court erred in denying the motion of complainant to dismiss without prejudice, for after the Circuit Court had denied leave to amend the bill of complaint, the denial of the motion to dismiss without prejudice made it impossible for the complainant

to bring a new complaint in another action for the same cause of action, said cause of action being the unlawful carrying by the defendant of the coal ostensibly owned by the Lehigh Valley Coal Company, but in reality owned legally or equitably by the defendant; as the original complaint did not sufficiently set forth the facts upon which the cause of action is based, and the Circuit Court allowed the complainant neither to amend nor to dismiss without prejudice, it will be impossible for complainant to obtain any relief in the premises.

VI.

The Circuit Court erred in dismissing absolutely the bill of complaint herein, for since the Circuit Court had denied the motion of complainant to amend, and had further denied the motion to dismiss without prejudice, said absolute dismissal operates as a bar to the institution on the part of complainant of any new suit for the same cause of action, and accordingly prevents the complainant from obtaining a decree enjoining the carriage by the defendant of the coal ostensibly owned by the Lehigh Valley Coal Company, but which is in reality either legally or equitably owned by the defendant, said Lehigh Valley Coal Company being nothing more than a department or bureau of the railroad company and not a bona fide company within the meaning of that term as used in the opinion of the Supreme Court.

VII.

The Circuit Court erred in holding that it had been decided by the Supreme Court on said appeal that the Lehigh Valley Coal Company is a bona fide coal company within the meaning of that term as used in the opinion of the Supreme Court, and that the carriage of the coal by the defendant is not prohibited by the commodities clause, and in dismissing the bill of complaint absolutely accordingly.

VIII.

The Circuit Court erred in holding that it had been decided by the Supreme Court on said appeal that the Lehigh Valley Coal Company is not a mere adjunct or instrumentality of the defendant and that the defendant had not at the time of transportation any interest, direct or indirect, in a legal or equitable sense, in the coal ostensibly owned by the Lehigh Valley Coal Company, and that the carriage of said coal by the defendant is not prohibited by the commodities clause, and in dismissing the bill of complaint absolutely accordingly.

IX.

The Circuit Court erred in holding that it had been decided by the Supreme Court on said appeal that said coal was not mined or produced under the authority of the defendant railroad, and that the defendant at the time of transportation and before the act of transportation had in good faith dissociated itself from all exercise of authority over said coal,

and that the carriage of said coal by the defendant is not prohibited by the commodities clause, and in dismissing the bill of complaint absolutely accordingly.

X.

The Circuit Court erred in holding that it had been decided by the Supreme Court on said appeal that the operation of the Lehigh Valley Coal Company by the defendant, by virtue of the control, direction, domination, and supervision exercised by the defendant over all the acts of said coal company, is not in effect merely a device for evading the law, and more particularly the provisions of the said commodities clause, and that the carriage of said coal by the defendant is not prohibited by the commodities clause and in dismissing the bill of complaint absolutely accordingly.

XI.

The Circuit Court erred in holding that it had been decided by the Supreme Court on said appeal that the carriage of said coal by the defendant under the circumstances set out in the proposed amended bill of complaint is not prohibited by the commodities clause and in dismissing the bill of complaint absolutely accordingly.

XII.

The Circuit Court erred in not permitting the complainant to file an amended bill of complaint, and thereby to present for the consideration of the court the question of whether or not the Lehigh Valley Coal

Company is a bona fide company within the meaning of that term as used in the opinion of the Supreme Court and whether or not the carriage of the coal of said company by the defendant is prohibited by the commodities clause.

XIII.

After the Circuit Court had denied the motion to amend, said court further erred in denying the motion of complainant to dismiss without prejudice, for that said denial of said motion prevented the complainant from bringing a new bill of complaint in another action, and thereby presenting for the consideration of the court the question of whether or not the carriage by the defendant of the coal ostensibly owned by the Lehigh Valley Coal Company is prohibited by said commodities clause.

XIV.

After the Circuit Court had denied the motion to amend and had further denied the motion of complainant to dismiss without prejudice, said court further erred in dismissing the bill of complaint for that said dismissal prevents the complainant from bringing a new bill of complaint in another action, and thereby presenting for the consideration of the court the question of whether or not the carriage by the defendant of the coal ostensibly owned by the Lehigh Valley Coal Company is prohibited by said commodities clause.

ARGUMENT.

I.

The prohibition of the commodities clause, as construed by this court, applies to the coal of a corporation which is not a bona fide, distinct, independent coal company, but is merely an adjunct or department of the carrier and a device which would evade that provision of the Hepburn Act.

In interpreting the commodities clause, this court decided that the mere ownership of stock in a coal company by the carrier does not of itself constitute an interest in the coal mined by the coal company so as to inhibit its transportation by the railroad owning the stock. On the previous appeal the Government contended that the statute prohibits the carriage of coal owned by a mining company in which the carrier holds stock, irrespective of the extent of such stock ownership, and irrespective of the actual relations existing between the coal company and the carrier. Having assumed that an interest in the stock of the coal company constitutes an interest in the coal sufficient to bring the case within the prohibition of the statute, the Government in its original complaint merely declared the existence of that stock relationship. It made no attempt to describe the actual relations existing between any of the coal companies and the carriers. It proceeded upon the single theory that the ownership of stock made the transportation of coal

unlawful. Therefore the opinion of this court is limited to a rejection of that theory. The court points out, however, that its decision does not apply to a coal company which is not a *bona fide* company. The opinion repeatedly uses the phrase "*bona fide*." Whenever it speaks of the ownership of stock, it refers to stock of a "separate and distinct" corporation, or of a "distinct" corporation, or of a "*bona fide*" corporation.

That part of the opinion in which is considered the effect of holding stock in a coal company is as follows (213 U. S., p. 413):

> It remains to determine the nature and character of the interest embraced in the words "in which it is interested directly or indirectly."
>
> The contention of the Government that the clause forbids a railroad company to transport any commodity manufactured, mined or produced, or owned in whole or in part, etc., by a *bona fide* corporation in which the transporting carrier holds a stock interest, however small, is based upon the assumption that such prohibition is embraced in the words we are considering. The opposing contention, however, is that interest, direct or indirect, includes only commodities in which a carrier has a legal interest, and therefore does not exclude the right to carry commodities which have been manufactured, mined, produced or owned by a separate and distinct corporation, simply because the transporting carrier may be interested in the producing, etc., corporation as an owner of stock therein.

If the words in question are to be taken as embracing only a legal or equitable interest in the commodities to which they refer they can not be held to include commodities manufactured, mined, produced or owned, etc., by a distinct corporation merely because of a stock ownership of the carrier. (*Pullman Palace Car Co.* v. *Missouri Pacific R. R.*, 115 U. S., 587; *Conley* v. *Mathieson Alkali Works*, 190 U. S., 406.) And that this is well-settled also in the law of Pennsylvania is not questioned. It is unnecessary to pursue the subject in more detail, since it is conceded in the argument for the Government that if the clause embraces only a legal interest in an article or commodity it can not be held to include a prohibition against carrying a commodity simply because it had been manufactured, mined or produced, or is owned by a corporation in which the carrier is a stockholder. The contention of the Government substantially rests upon the assumption that unless the words be given the meaning contended for they are without significance.

That this is clearly not the case is well illustrated by the *New Haven case, supra.* In that case the Chesapeake & Ohio Railway Company it was shown at one time not only directly engaged in buying, selling and transporting coal, but subsequently, when a statute was passed in West Virginia prohibiting such dealings, it resorted to indirect methods for the continuance of its previous practice. It may well be that the very object of the provision was to reach and render impossible the

successful employment of methods of the character referred to. Certain it is, however, that in the legislative progress of the clause in the Senate, where the clause originated, an amendment in specific terms, causing the clause to embrace stock ownership, was rejected, and immediately upon such rejection an amendment, expressly declaring that interest, direct or indirect, was intended, among other things, to embrace the prohibition of carrying a commodity manufactured, mined, produced or owned by a corporation in which a railroad company was interested as a stockholder, was also rejected. 1906, 40 Con. Rec., 7, pp. 7012–7014.

And the considerations just stated we think completely dispose of the contention that stock ownership must have been in the mind of Congress, and therefore must be treated as though embraced within the evil intended to be remedied, since it can not in reason be assumed that there is a duty to extend the meaning of a statute beyond its legal sense upon the theory that a provision which was expressly excluded was intended to be included. If it be that the mind of Congress was fixed on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it. At all events, in view of the far-reaching consequences of giving the statute such a construction as that contended for, as indicated by the statement taken from

> the answers and returns which we have previously inserted in the margin, and of the questions of constitutional power which would arise if that construction was adopted, we hold the contention of the Government not well founded.

The court then summarized its decision in the paragraph quoted, supra, page 4, the last clause of which summary is that the statute prohibits a railroad company transporting articles "(*c*) When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced or owned by a *bona fide* corporation in which the railroad company is a stockholder."

These quotations make clear two propositions: First. The Government had contended that the mere presence of stock ownership, irrespective of the extent of that ownership and irrespective of the relations existing between the coal company and the carrier, of itself created on the part of the carrier an interest in the coal of the coal company. Second. The prohibition of the commodities clause applies to the coal of a company which is not a *bona fide* coal company, but a mere adjunct of the business of the carrier.

The court qualifies the corporation of which it is speaking by describing it first as a "*bona fide*" corporation, in the next sentence as a "separate and

distinct" corporation, and in the sentence following as a "distinct" corporation. In another part of the opinion it is suggested that the going into effect of the clause may have been deferred in order to afford the time essential to making the changes which would be required to conform to the meaning of the clause as interpreted by the Supreme Court "such as providing the facilities for dissociation by sale at the point of production before transportation or segregation, by means of the organization of *bona fide* manufacturing or mining producing corporations." In the summary of the decision quoted above it is clearly pointed out that the statute does not include articles or commodities mined or owned "by a *bona fide* corporation in which the railroad company is a stockholder." Of course, if the exception to the inhibition of the statute applies to *bona fide* corporations, as stated by this court, then it must follow that the coal of companies not *bona fide* falls within the inhibition of the statute, and the transportation thereof by the carrier of which the coal company is a mere department or instrumentality is a violation of the law.

After this court had remanded the case for further proceedings in conformity with the opinion of this court, and after the case had been reinstated on the docket the Government attempted to amend its pleadings by supplying in the record certain allegations of fact, in order to show that the Lehigh Valley Coal Company is in fact but a department of the

railroad. These allegations were not stated in the original complaint for the reason that it was considered at that time that an ownership of stock by the railroad in the coal company made the carriage by the railroad of the coal of the coal company unlawful. When the motion of the United States to amend its complaint had been denied, the Government asked for a dismissal without prejudice, in order that it might in a new action present the question for the determination of the court. The court denied this motion and then on motion of counsel for defendant dismissed the complaint. The decrees entered on the several motions appear in the record, pages 141, 148, 152.

II.

The United States asked leave to amend its complaint in order to plead facts which, if proven, would establish the substantial identity of the coal company and the carrier.

An examination of the pleadings supports our contention that when the Government filed its original bill of complaint it rested its case entirely on the allegation of stock ownership, and did not attempt to set out in its complaint the existing relations between the Lehigh Valley Coal Company and the Lehigh Valley Railroad Company, for the reason that the Government believed that the statute applied to all cases of stock ownership and not merely to cases where the coal company is not a *bona fide* coal company, but merely a department of the railroad. The Government made no distinction in the character and definiteness of its allegations between cases where the only relationship between the coal company and the railroad is stock relationship and cases where the coal company is a mere adjunct, instrumentality, and department of the railroad company. This is clear from the examination of the allegations in the original bill of complaint respecting the several coal companies in which the Lehigh Valley Railroad Company owns stock. In some of these companies the railroad company owns

all the stock, in other companies a majority of the stock, and in still others only a minority. The extent of control exercised over these several classes of companies differs in great degree, and yet in respect to each class the Government made the same allegations. (Rec., pp. 2 to 4.) In each case it is asserted that by virtue of the ownership of the capital stock, whether entire, majority, or minority, the defendant owns the coal lands and coal mines of the coal company. (Rec., p. 2, folio 6, p. 3, folio 8, p. 4, folio 9.)

The original complaint alleges generally that by virtue of the management of the coal companies by certain of the officers of the railroad the operations of the coal companies *in the mining* of anthracite coal are being carried on by and under the authority of the defendant. It is to be noted, however, that this allegation is limited to a description of the mining of the coal and does not assert that the railroad carrier exercises any authority at the time of transportation or has any interest in the coal at the time of transportation. On the prior appeal the pleadings, the briefs, the argument, and the opinion considered the single question of the effect of stock ownership in a coal company creating an interest in the coal of that company on the part of the railroad.

The original bill of complaint recites every coal company in which the railroad owns stock, and in language identical in each case, asserts that by vir-

tue of the ownership of stock in a coal company, whether it be all, a majority, or a minority, the railroad owns the coal lands and has an interest in the coal mined, bringing the transportation thereof within the inhibition of the statute.

Paragraph 3 of the original bill provides as follows (Rec., p. 2):

> That the defendant is, and has been continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of the entire capital stock of the Lehigh Valley Coal Company and of Coxe Brothers & Co., Incorporated, corporations of the said State of Pennsylvania, and that it thus controls, and has been controlling, the election of the directors or managers of said coal companies. That said coal companies hold, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Carbon, Lehigh, Luzerne, and Wyoming, in the said State of Pennsylvania; but said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the direct management of the respective presidents and directors of said coal companies, the president of each of said coal companies being, as he has been for a long time past, the president of the defendant, and a majority of the directors of each of said coal companies

> being officers or directors of the defendant, as they have been for a long time past. That by virtue of the ownership of the entire capital stock of said coal companies by the defendant, as hereinbefore stated, the defendant owns said coal lands and coal mines, and the anthracite coal therein or thereupon and mined, and being mined, therefrom, and has an interest therein; and that, by virtue of the management of said coal companies by certain of the officers of the defendant, as hereinbefore stated, the operations of said coal companies in the mining of anthracite coal, have been, and are now being, carried on by and under the authority of the defendant.

It is apparent that in the paragraph just quoted the Government rested its contention upon the ownership of the stock, for it is stated that by virtue of the ownership of the entire capital stock the defendant has an interest in the coal. The only allegation which in any way refers to the relations of the two companies is the averment that the operations of the coal company in the *mining* of anthracite coal are under the authority of the defendant. There is nothing pointing to the exercise of control subsequent to mining and at the time of transportation. There is nothing to indicate that the relations between the Lehigh Valley Coal Company and the Lehigh Valley Railroad Company in any respect differ from the usual relations existing between two companies, one of which is a stockholder in the other.

The allegations contained in paragraph 3 of the original bill were repeated in paragraphs 4 and 5 of

that bill, in connection with the coal companies in which the Lehigh Valley Railroad Company owns a majority or a minority of the stock. In paragraph 4 it is stated that "by virtue of the ownership of a majority of the capital stock of said company by the defendant as hereinbefore stated, the defendant practically owns said coal lands and coal mines and the anthracite coal therein or thereupon and mined and being mined therefrom, and is also owner thereof in part, and has an interest therein." (Rec., p. 3, folio 8.)

Paragraph 5 of the original bill refers to certain coal companies in which the defendant owns a minority of the stock and contains the allegation: "That by virtue of the management of said coal companies by officers or directors of the defendant, the operations of said coal companies in the mining of anthracite coal have been and are now being carried on by and under the authority of the defendant." (Rec., p. 4, folio 9.)

The amended bill of complaint did not attempt to set up a new cause of action, nor facts foreign to the cause of action stated in the original complaint. The cause of action of the United States arises from the alleged unlawful transportation by the Lehigh Valley Railroad of the coal ostensibly owned by the Lehigh Valley Coal Company, in which coal it is claimed the railroad has an interest at the time of transportation. This was the cause of action charged in the original bill of complaint, but the Government there alleged in support of its claim facts which in the opinion of the Supreme Court were insuffi-

cient to establish its contention that a cause of action existed. The Government in its complaint had contended that the transportation was unlawful simply for the reason that the railroad owned the stock of the coal company. The Supreme Court rejected that proposition, but held that other facts, if alleged and proven, would establish the cause of action which the Government claims exists. The amended bill of complaint alleges these additional facts, which, however, merely go to establish the same cause of action that was set up in the original complaint, namely, the unlawful transportation by the railroad of the coal ostensibly owned by the Lehigh Valley Coal Company.

The original bill of complaint made no attempt to describe the relations existing between the Lehigh Valley Railroad Company and any of its subsidiary coal companies. The object of the allegations of the amended bill was to set out in detail facts which establish that the Lehigh Valley Coal Company is a mere adjunct of the business of the railroad, and to describe with particularity the real situation which the Government contends is unlawful. Paragraph 3 of the amended complaint is almost entirely new matter. Paragraphs 4, 5, 6, and 7 of the amended bill correspond to paragraphs 6, 7, 8, and 9, respectively, of the original bill, and are practically identical with those paragraphs. Paragraphs 4 and 5 of the original bill were omitted in the amended bill, as they refer to other coal companies than the Lehigh Valley Coal Company.

The amended complaint describes the relations existing between the Lehigh Valley Coal Company and the railroad company by the following allegations contained in paragraph 3 of the amended bill (Rec., pp. 142 to 145):

> That as such common carrier, the defendant has been and now is engaged in interstate transportation of anthracite coal from the mines in the State of Pennsylvania to the markets of other States, in violation of the act of Congress approved June 29, 1906, and more particularly the fifth paragraph of the first section of said act; and that the defendant, unless restrained by this court, will continue to violate said statute. This violation is being and will continue to be accomplished in the following manner:
>
> The defendant continuously for several years last past has been and now is the owner of the entire capital stock of the Lehigh Valley Coal Company, hereinafter called "the Coal Company," a corporation of the State of Pennsylvania, which holds by conveyances and leases anthracite coal lands and coal mines situated in the counties of Carbon, Lehigh, Luzerne, and Wyoming, in the State of Pennsylvania, which mines have been and are being operated in the mining of coal, and are tributary to the lines of transportation operated by the defendant, and the coal so mined has been and is being carried by defendant over its said lines of transportation. There have been and are a large number of other companies and individuals situated in the same localities and

engaged in the mining of such anthracite coal and in shipping the same over the lines of transportation owned by the defendant to markets in other States in competition with each other and the Coal Company.

The Coal Company is so organized and controlled by the defendant, and its affairs are so conducted as to make it merely an instrumentality or adjunct of the defendant. That the Coal Company is a mere adjunct, instrumentality, or department of the defendant appears from the following facts, among others:

For a long time past the defendant has owned and now owns the entire capital stock of the Coal Company.

For a long time past the officers of the defendant have been and are now the principal officers of the Coal Company. They are appointed officers of the Coal Company through the influence of the defendant, and for the reason that they are, respectively, officers of the defendant; as officers of the Coal Company they are acting merely on behalf of and for the defendant, and under the direction and instructions of the latter.

Specifying the officers more particularly:

The president of the defendant, E. B. Thomas, is president of the Coal Company; the first vice president of the defendant, J. A. Middleton, is second vice president of the Coal Company; the assistant to the president of the defendant, L. D. Smith, is assistant to the president of the Coal Company; the secretary of the defendant, D. G. Baird, is secretary of the Coal Company; the treasurer of the

defendant, W. C. Alderson, is treasurer of the Coal Company; the assistant treasurer of the defendant, J. M. Baxter, is assistant treasurer of the Coal Company; the assistant secretary of the defendant, E. A. Albright, is assistant secretary of the Coal Company; the assistant treasurer of the defendant, J. William Robbins, is assistant secretary of the Coal Company.

Of the six directors of the Coal Company the following, to wit, George F. Baker and E. T. Stotesbury, are directors of the defendant, and J. A. Middleton and L. D. Smith are, respectively, first vice president and assistant to the president of defendant.

E. B. Thomas, E. T. Stotesbury, and George F. Baker, who are on the executive committee of the Coal Company, are also on the executive committee of the defendant.

The defendant, by reason of the fact that it owns the entire capital stock of the Coal Company, is enabled to and does dictate who shall be elected directors of the Coal Company, who shall be its officers and employees, and who shall be on the various committees.

Each of the above-named officers, directors, and committeemen, and others not specified, is appointed to his position in the Coal Company by reason of his holding a position with the defendant, thereby enabling him in all matters to act in the interests and on behalf of the defendant, and in the position in the Coal Company to which he has been appointed he acts in reality for and on behalf of the defendant and under the directions of the latter.

The Coal Company uses the offices of the defendant, and the work of the Coal Company is carried on over the office desks belonging to the defendant. The Coal Company in fact is nothing more than a department of the defendant, being operated by officers who in their principal capacity are officers of the defendant and by virtue of their position in the defendant, control and dominate the actions of the Coal Company.

The defendant, through its officers and directors, exercises a supervision over the coal mined by the Coal Company from the time of the mining of said coal to the sale of the same at New York and other markets. The defendant, through its officers and directors, determines how much coal the Coal Company shall mine, it dictates the shipment and transportation of said coal over its own lines, and it fixes, regulates, and determines the price at which the Coal Company shall sell the coal at the Atlantic seaboard and other places to which it has been transported over the lines of the defendant or at the dictation of the defendant.

Acting under the direction and instructions of the defendant, and of its officers and directors, the Coal Company has entered and is entering into contracts with other companies and individuals, producers and miners of coal, and tributary to the lines of transportation owned by defendant and to other railroads, for the purchase of the coal mined by said companies and individuals. The defendant causes this coal to be shipped and transported

over its own lines, and, acting through the Coal Company, it fixes and determines the price at which such coal shall be sold after transportation to the Atlantic seaboard and other markets. The Coal Company as a rule loses money on these transactions, as the amounts received by it for the coal which it has bought from such companies and individuals generally do not equal the price paid by it for the coal plus the cost of transportation to market. The purpose of the defendant in compelling the Coal Company to enter into such contracts with other coal companies and individuals is thereby to remove the competition which would otherwise exist between the coal mined and sold by such companies and the coal controlled by the defendant through the Coal Company, and, furthermore, to enable the defendant by means of these contracts to dictate the transportation of such coal over its own lines, and to obtain the freight charged therefor.

The Coal Company has not paid any dividends upon its stock during the time such stock has been owned by the defendant. It has been furnished millions of dollars by the defendant, which it has never refunded, and upon which during many years it paid no interest. The defendant has guaranteed bonds of the Coal Company and paid interest on such bonds. The earnings of the defendant received for the transportation over its lines of the coal produced by the Coal Company and of the coal controlled by means of the contracts above described compensates the de-

fendant for the failure of the Coal Company to pay dividends on its stock.

The operation of the Coal Company by the defendant in effect merely is a device for evading the law, and more particularly the provisions of the said commodities clause. The Coal Company is not a bona fide mining company, but is merely an adjunct or instrumentality of the defendant. The defendant is in legal effect the owner of and has a pecuniary interest in the coal mined by the Coal Company, and which is transported by the defendant.

That by virtue of the facts hereinbefore set out and otherwise, and more particularly by virtue of the control, direction, domination, and supervision exercised by the persons who are the officers of the defendant railroad and by the defendant over all the operations of said Coal Company, embracing the mining and production of said coal, the shipment and transportation of the same over the defendant railroad, and the sale thereof at the seaboard, it follows:

First. That the Coal Company, not being in substance and in good faith a *bona fide* corporation, separate from the defendant, but a mere adjunct or instrumentality of the defendant, the defendant, at the time of transportation, has an interest, direct or indirect, in a legal or equitable sense, in said coal.

Second. That said coal of said Coal Company is mined and produced under the authority of defendant, and the defendant at the time of transportation and before the act of transportation has not in good faith dissociated

itself from all exercise of authority over said coal, but continues to exercise authority over said coal at the time of transportation and over the subsequent sale thereof.

Therefore the transportation of said coal by the defendant in the manner and under the circumstances hereinabove described constitutes a violation of the fifth paragraph of the first section of said "act to regulate commerce," as amended by an act of Congress approved June 29, 1906.

The object of these additional allegations which the Government endeavored to introduce into the case by the filing of the proposed amended bill of complaint was twofold. First, to establish a substantial identity of the Lehigh Valley Coal Co. and the Lehigh Valley Railroad Co., although each is a separate corporate entity. Second, to show that "at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from" the coal. The original bill of complaint contained no allegations upon either point.

Of course, at this stage the question of fact as to the truth of these allegations is not before the court. We have only to determine the question of law, namely, admitting the allegations to be true, whether they sufficiently state a cause entitling the United States to relief. On the question of fact, however, it is pertinent to refer to the recent opinion of Circuit Judge Buffington (not yet reported) in the case of *United States* v. *Reading Company et al.* This was a suit in equity instituted by the United States in the Third Circuit against the Reading Co., Lehigh Valley

Railroad Co., and other companies to restrain alleged violations of the Sherman antitrust act. Referring to the relations existing between the defendant railroads and their subsidiary coal companies, Judge Buffington said:

> The substantial identity of the several defendant railroads and their respective subsidiary coal companies is shown in the proofs. Take, for example, the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company. The Coal Company's stock is all owned by the Railroad Company. No dividend has ever been paid upon it. The funds to operate it are advanced by the Railroad Company. Its present indebtedness to the latter is about eleven million dollars. On this no interest is paid. Both companies have the same officers and in its annual report the Railroad Company says, "Under existing arrangements the Lehigh Valley Coal Company is compelled to depend upon the Railroad Company for working capital to carry on its operations." In other words, the Coal Company is the subsidiary, corporate hand of the Railroad Company, and while its corporate entity is separate, yet in work, profit, interest, and official personnel, it is but an alter ego of the Railroad Company itself. And such is the view taken of this relation by the courts.
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> In *Interstate Commerce Commission* v. *Baird* (194 U. S., 42), the Supreme Court say: "Here is a railroad company engaged at once in the purchase of coal through a company which it practically owns."

III.

It is the use of the coal company which the Government asserts is not in good faith; it does not attack the corporate entity of the coal company.

It is not intended in this brief by the use of the word "bona fide" to intimate that the Lehigh Valley Coal Company is not a bona fide corporation; that is, it is not intended to suggest that the Coal Company is not a valid corporation having corporate existence by virtue of the laws of the State under which it was organized. The purpose of the Government is to establish that the *use* of the Coal Company by the railroad under the circumstances set out in the amended bill of complaint is in fact a device for evading the provisions of the commodities clause. In this respect the case is parallel to the Northern Securities case. (193 U. S., 197.) The Northern Securities Company was a device in corporate form to evade the Sherman antitrust law. As a corporation it had the power to purchase stock and other property (*Harriman* v. *Northern Securities Company*, 197 U. S., 244), and such purchase by it gave the company a valid title. But because the stockholders of the Northern Pacific Railroad Company and of the Great Northern Railway Company had combined through the Northern Securities Company, and had given that company the power to prevent

competition between the railway companies and thus to evade the Sherman Act, this court intervened and prevented the exercise of that power, and enjoined the Securities Company from exercising any control over either railway, or using the voting power of the railway shares. Mr. Chief Justice Fuller said in the Harriman case (197 U. S., 291):

> Some of our number thought that as the Securities Company owned the stock the relief sought could not be granted, but the conclusion was that the possession of the power, which, if exercised, would prevent competition, brought the case within the statute, no matter what the tenure of title was.

After the decision in the Northern Securities case, Harriman and others, who had surrendered certain Northern Pacific stock to the Northern Securities Company in exchange for the stock of that company, contended that they were entitled to a restitution of the shares of the Northern Pacific stock which they had exchanged for the stock of the Securities Company, but this court held that the transaction between the complainants in the Harriman case and the Northern Securities Company was one of purchase and sale of Northern Pacific Company stock for shares of stock of the Securities Company and for cash, and was not a bailment or trust, and that the corporate property of the Northern Securities Company should be divided pro rata among the stockholders of that company. (197 U. S., 244.)

This court prevented the use of the Northern Securities Company as a device to evade the Sher-

man Act, but in every other respect it left the Securities Company with all the rights of a bona fide corporation. It was the *use* of the Securities Company to circumvent the policy and provisions of the Sherman Act which this court prohibited. It was only in that respect that the company was not bona fide.

So in the case of *United States* v. *Reading Company and others*, referred to above (supra p. 32), where the defendants by concerted action through the instrumentality of a corporation in which they owned all the stock, acquired control of certain collieries, Circuit Judge Gray said:

> The Temple Iron Company was the palpable instrument or means by which the unlawful purpose of the combination was accomplished, and its acquirement of the said collieries, in pursuance of that combination, must be held as illegal.

Circuit Judge Buffington said:

> Does this combination of all of the defendant railroads for the avowed purpose and with the effect of preventing the threatened building of a competitive road for the transporting of coal in interstate commerce fall within the ban of the statute? That the Temple Iron Company is a mere holding company, the instrument for effecting the purpose of the combination, is apparent from the proof, and indeed, as we have seen in the testimony of Mr. Baer, is conceded. The ownership of its stock was and is now in the defendant railroads, the

> Temple Iron Company being a mere convenient, unitary holding agency for joint, combining railroad interests. If this combination, which the proofs show was made by all these defendant railroads, is not within the prohibition of the statute, what legal bar is there to these railroads, through the agency of the Temple Iron Company, jointly and in combination, absorbing the remaining anthracite coal not now owned by their subsidiary coal companies? There is none.
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> * * * * *
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> It is no answer to this to say the Temple Iron Company has corporate power to hold the stock of mining companies. Concededly it has. The law forbids not the use, but the abuse, of the corporate powers of this Pennsylvania corporation. The question before us is not whether the Temple Iron Company had corporate power to own mines and mining stocks, but whether these six railroad companies have made the lawful corporate power of the Temple Iron Company to hold mines and mining companies' shares an instrument to enable them to jointly combine "in restraint of trade or commerce among the several States." If so, the act makes the combination unlawful without reference to the particular means used to effect the unlawful end.

In *New Haven Railroad Company* v. *Interstate Commerce Commission* (200 U. S., 361, 390) this court held that a carrier engaged in interstate commerce has not the power to contract to sell and transport, in completion of the contract, the commodity sold, when

the price stipulated in the contract does not pay the cost of purchase, the cost of delivery, and the published freight rates. Referring to the second section of the interstate-commerce act, which makes it unlawful for a common carrier "directly or indirectly by any special rate, rebate, drawback, or other device" to charge or receive from any person a greater or less compensation for any service rendered than it charges or receives from any other person, this court said (p. 391):

> Now, in view of the positive command of the second section of the act, that no departure from the published rate shall be made, "directly or indirectly," how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about.

This language is peculiarly pertinent in the case at bar. This court has held that the purpose of the commodities clause was to accomplish the disso-

ciation of the carrier, prior to the transportation, from the commodity which it transports. This purpose will not be accomplished if the carrier may organize a coal company, acquire all the capital stock therein, and thereafter direct all the operations of the coal company, including the mining of the coal, the transportation over the lines of the carrier, and the subsequent sale after transportation. The operation of the coal company by the carrier becomes an indirect method of evading the law, such as was referred to by this court in the commodities clause cases. (213 U. S., at p. 414.) Referring to the contention of the Government that the mere ownership of stock in a coal company gives the carrier an interest in the coal, the court said:

> The contention of the Government substantially rests upon the assumption that unless the words be given the meaning contended for they are without significance. That this is clearly not the case is well illustrated by the *New Haven case*, *supra*. In that case the Chesapeake and Ohio Railway Company it was shown at one time not only directly engaged in buying, selling and transporting coal, but subsequently, when a statute was passed in West Virginia prohibiting such dealings, it resorted to indirect methods for the continuance of its previous practice. It may well be that the very object of the provision was to reach and render impossible the successful employment of methods of the character referred to.

The indirect method referred to, which was adopted by the Chesapeake & Ohio to evade the West Virginia statute, was to contract with operators in West Virginia to procure the coal for delivery to the New Haven road, not in its own name but through another. (200 U. S., 389.)

On the former appeal counsel for the defendants in their general brief, page 32, in discussing the meaning of the words "direct or indirect interest" said:

> In many cases, without there being an actual ownership, there might be such a "direct or indirect interest" in the coal, as might well be supposed to have been contemplated. It may, for instance, be said that Congress intended to prohibit the transportation of coal not owned by the railroad company, but held for it by a trustee. Again. A railroad company might, in order to evade the act, authorize a delivery in Pennsylvania to some third person, upon the undertaking of the latter to forward the goods thus delivered, to another State; to sell the same, and to pay over the net proceeds to the carrier.
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> Again. The railroad company might purchase, in Pennsylvania, coal belonging to a third person, under a contract by which such person would agree to retain title to and deliver the coal to the order of the railroad company in another State upon payment, there.
>
> Again. The railroad company might agree to sell coal in the State of Pennsylvania to a person, under a contract, by which such person would take title thereto, in Pennsylvania,

being only obligated to pay therefor after delivery to him in another State.

In all these cases, though, there would be no actual ownership; there would be in the carrier an "interest, direct or indirect," in the coal. It is not necessary to multiply enumerations of cases in which there could be such an interest in the carrier, and in the thing carried, as might bring the transportation within the policy of the act, though such interest would not amount to ownership. To the words used a meaning can be given which would amount to a provision against evasion, in cases in which the carrier was really the owner of the coal.

If the words "interest, direct or indirect" amount to a "provision against evasion" as suggested by counsel for appellee in their former brief, they certainly apply in this case. We do not contend that it is the ownership of the entire capital stock of the Lehigh Valley Coal Company which gives the Lehigh Valley Railroad Company an interest in the coal mined ostensibly by the coal company. Our contention is that the actual relations existing between the mining company and the carrier establish that the mining company is merely an adjunct of the business of the railroad company; it is a subterfuge by which, through the medium of separate corporate entity, the purposes sought to be accomplished by the clause are directly evaded. The ownership of the stock of the coal company is but one of the facts to be taken into consideration in determining the actual relations of the

coal company and the carrier. The ownership of all the stock vests in the carrier the power to use the subsidiary company as a tool; but the existence of the power, standing by itself, does not, of course, establish its exercise. However, except in cases where the railroad owns at least a majority of the stock, it will not have the power to use the coal company as a tool. Ownership of stock is merely one circumstance to be taken into consideration with other facts in determining the real character of the coal company. In the case at bar the Coal Company is a "corporate trustee" holding title to the coal for the benefit of the carrier.

The two cases cited by this court in the opinion in the *Commodities cases* (supra, p. 14), *Pullman Palace Car Co.* v. *Missouri Pac. R. R.* (115 U. S., 587), *Conley* v. *Mathieson Alkali Works* (190 U. S., 406), and the case of *Peterson* v. *Chicago, Rock Island & Pacific Railway Co.* (205 U. S., 364), relied upon by the appellee on the prior appeal, were cases involving the question of the effect of ownership of stock only. In none of them was it alleged that the subsidiary company was the mere creature and tool of the other corporation. There was no attempt in those cases to prove a substantial identity of the two corporations.

In the *Pullman case* (115 U. S., 587) the Missouri Pacific had agreed that the Pullman Company should have the exclusive right to furnish sleeping cars over its entire line of railway, "and on all roads which it controls or may hereafter control by ownership, lease,

or otherwise." The successor of the Missouri Pacific, a company of the same name, acquired the larger part of the capital stock of the St. Louis, Iron Mountain & Southern. On demurrer to the bill it was held that this ownership of stock did not bring the St. Louis & Iron Mountain within the operation of the clause above quoted, and the bill was dismissed. It is apparent that the pleadings presented a very different question from that involved in the case at bar. Only the effect of stock ownership was considered. Mr. Justice Waite said (p. 596):

> Confessedly the St. Louis, Iron Mountain and Southern Company keeps up its own corporate organization. It operates its own road. It has its own officers and makes its own bargains. The Missouri Pacific owns all, or nearly all, its stock, and in that way can determine who shall constitute its board of directors, but there the power of that company over the management stops. The board when elected has controlling authority, and for its doings is not necessarily answerable to the Missouri Pacific Company. The two roads are substantially owned by the same persons and operated in the same interest, but that of the St. Louis, Iron Mountain and Southern Company is in no legal sense controlled by the Missouri Pacific. * * *
>
> The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain and Southern Company, and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road,

but that is not in law the control itself. Practically it may control the company, but the company alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs. Ordinarily they elect the governing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain and Southern to control the election of directors, and this it has done. The directors now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the directors act contrary to the wishes of the Missouri Pacific Company that company has no power to prevent it, except by the election, at the proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property.

The Conley and Peterson cases (supra) deal entirely with the question of what is sufficient service in one State upon a corporation of another State. In the *Conley case* (190 U. S., 406) service had been made in New York upon two directors, but not officers, of a Virginia corporation, the Mathieson Alkali Works,

residents of New York, and the only question was whether the Virginia corporation was doing business in New York. The question was referred to a master, before whom testimony was taken. The master found that the Mathieson Company at one time had done business in New York, but that it had transferred all its property to another company, the Castner Electrotype Alkali Company, in consideration of the receipt by it of the entire capital stock of the new company; thereafter it had discontinued doing any business in New York State. The master held that ownership of all the stock of the Castner Company, which was doing business in New York, did not amount to a transacting of business in New York by the Mathieson Company, and that it was the Castner Company alone which transacted business in New York. This court affirmed the Circuit Court which had affirmed the master's report.

In the Conley case there had been no claim that the transfer to the Castner Company had been in fraud or that the parties were accomplishing any evasion of the law. Mr. Justice McKenna said (p. 411):

> Whether the transfer to the latter company was fraudulent we certainly can not decide from this record, and the by-law which provided for a monthly meeting in New York, would not of itself keep the corporation in New York. The testimony is positive that no business of the corporation was done in New York City after the transfer of the Niagara Falls plant.

In the Peterson case the question was whether service upon an agent of a corporation in which the defendant owned practically all the stock was a valid service upon the defendant. The defendant asserted that these agents of its affiliated company were not agents of itself, and proof was taken thereon. (205 U. S., 366.) The circuit court found on the facts that the persons served were not agents of the defendant, and accordingly dismissed the case. This judgment was affirmed by this court, the Chief Justice and Mr. Justice Moody dissenting.

It is to be observed that the Peterson case went to proof and the case was decided upon the evidence adduced (pp. 366–384). On the other hand, in the case at bar the appellant has been denied any opportunity to prove the allegations set up in the amended bill of complaint. At this stage of the proceedings those allegations must be taken as true, thus leaving only a question of law for the court, namely, whether the coal company is sufficiently described as the mere creature of the carrier, and, if the description to that effect is adequate, whether it does not follow that the carrier has an interest in the coal at the time of transportation.

It is apparent that the court decided the Peterson case upon the evidence before it. Mr. Justice Day said (p. 390):

> Is it true that the Gulf Company was the agent of the Pacific Company or its mere creature in such a sense that to serve it is equivalent to serving the controlling com-

pany? It is a fact that both companies had common agents and employees to a certain extent, but the record shows that such employees were paid in proportion to the business done for each company. And that while in the service of the companies respectively they were under the exclusive management and control of the company in whose service they were engaged, with no power to discharge or employ, the one company for the other; and that, although the service was in a sense common, it was kept distinct and separate in the control and payment of the employees while in the separate service of the respective companies.

It is true that the Pacific Company practically owns the controlling stock in the Gulf Company, and that both companies constitute elements of the Rock Island system. But the holding of the majority interest in the stock does not mean the control of the active officers and agents of the local company doing business in Texas. That fact gave the Pacific Company the power to control the road by the election of the directors of the Gulf Company, who could in turn elect officers or remove them from the places already held; but this power does not make it the company transacting the local business.

This record discloses that the officers and agents of the Gulf Company control its management. The fact that the Pacific Company owns the controlling amounts of the stock of the Gulf Company and has thus the power to

> change the management does not give it present control of the corporate property and business. (*Pullman Palace Car Co.* v. *Missouri Pacific Co.*, 115 U. S., 587, 597.)

In a number of bankruptcy cases the Federal courts have refused to permit the theory of the separate entity of a corporation to stand in the way of the courts assuming control of the property of a corporation not bankrupt, but which was in effect merely an adjunct or department of the bankrupt corporation. When it has appeared that the bankrupt corporation absolutely controlled and dominated another corporation having assets, the courts have held that those assets are subject to the claims of the creditors of the bankrupt corporation. Of course, in these cases the question of fraud and the intent of the parties to evade creditors is important, but the cases nevertheless indicate that the courts have the power to disregard the entity theory of a corporation when that theory is the means of evading the law.

In the case of *In re Watertown Paper Company* (169 Fed., 252), the Circuit Court of Appeals of the Second Circuit recognized the doctrine, although they held that the facts in that case did not warrant its application. Circuit Judge Noyes, writing the opinion of the court, said (p. 256):

> Unless, therefore, it can be shown that some exception to the general rule of separate corporate existence and liability applies in this case, it must follow that the claim of the Pulp Company should have been allowed. The

only exceptions to that rule possibly applicable here are:

(1) The legal fiction of distinct corporate existence will be disregarded, when necessary to circumvent fraud.

(2) *It may also be disregarded in a case where a corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality or adjunct of another corporation.*

Under the first exception the cases are numerous which hold that a person can not transfer his property to a corporation to defraud his creditors, nor employ a separate corporate existence to evade his liabilities.

After stating that the facts did not bring the case within this exception, he continued:

So the question is whether the case presented comes within the second exception to the rule—whether the Pulp Company was merely an adjunct of the business of the paper company, an agency or instrumentality through which it acted.

There is, as the appellees point out, a line of cases holding that, when one corporation creates another corporation for a particular purpose and holds all its stock, the latter will be treated as the agent of the former or as an instrumentality for carrying out its purposes. In these cases the controlling corporation has been held liable for the debts of the subordinate company. Citing *Interstate Telegraph Company* v. *Baltimore, etc., Telegraph Company.* (51 Fed., 49; 54 Fed., 50.)

> But the principles of those cases are only indirectly applicable here. Neither the paper company nor the Pulp Company owned any of the other's shares, and in no sense can it be said that the paper company organized the pulp company as a department of its business.
>
> * * * * *
>
> We can not, upon these facts, hold that the corporations were identical, nor that the Pulp Company was merely an adjunct or instrumentality of the Paper Company. Instead of coming under the exceptions, this case seems clearly to come within the general rule that the distinct corporate existence of two separate although associated corporations will be regarded by the courts.

In re Muncie Pulp Company (139 Fed., 546) was also decided by the Circuit Court of Appeals of the Second Circuit, Judge Coxe writing the opinion. It appeared that the bankrupt corporation, a New York company, with the object of doing certain business in Indiana, had incorporated there a company known as the Great Western Natural Gas and Oil Company. The Muncie Company made expenditures for the benefit of the other, treating the latter merely as an agent which the law made necessary for the full development of its business, particularly in Indiana. The Great Western Company kept no separate set of books, its entire administrative department being under the control of the Muncie Company. It had no assets except such as it acquired from the Muncie Company. Its stock was issued in the names

of the two officers, but was actually owned by the Muncie Company. Under these circumstances Circuit Judge Coxe said (p. 548):

> The Great Western Company was undoubtedly a mere creature of the Pulp Company, having no independent business existence and organized solely for the purpose of facilitating the business of the latter. The Great Western Company has no shadow of claim to the property in controversy, and to permit it, or its president, or shareholders, to dispose of such property, is to sanction a fraud upon the creditors of the Pulp Company.

The Supreme Court denied a petition for a writ of certiorari in this case. (202 U. S., 621.)

The case last mentioned is followed *In re Rieger, Capnor and Aultmark.* (157 Federal, 609.) In that case a partnership which was engaged in the commission business in buying and selling merchandise acquired, for the purposes of the partnership, 99 per cent of the outstanding stock of a manufacturing corporation. The partners, as directors and officers, managed the business of the corporation, the partnership taking and selling all of its output. When the partnership went into bankruptcy, the court held that the corporation was merely the agency of the partnership, and that its property became an asset of the bankrupt estate. The facts disclosed that the corporation was organized in 1896 by the two parties who formed the partnership in 1901. Therefore it is apparent that the interest in the corporation was not acquired for the purpose of evading the bank-

ruptcy law. The relations between the company and the partnership had become confused, so that the partners were unable to testify with accuracy as to which owed the other. The court said (p. 613):

> The fiction of legal corporate entity can not be so applied by the partners as to work a fraud on the part of their creditors, or hinder and delay them in the collection of their claims, and thus defeat the provisions of the bankrupt act. The doctrine of corporate entity is not so sacred that a court of equity, looking through forms to the substance of things, may not in a proper case ignore it to preserve the rights of innocent parties or to circumvent fraud.

Interstate Telegraph Company v. *Baltimore & Ohio Railroad Company* (51 Fed., 49) was a creditor's bill filed in equity, seeking to make the railroad company pay a judgment recovered against the Baltimore & Ohio Telegraph Company, of which the railroad held all the stock. It appeared that the railroad had an extensive telegraph business, and that when the Baltimore & Ohio Telegraph Company was incorporated it took all the capital stock. The incorporators and officers of the Telegraph Company were employees of the railroad and appointed by it. The court said (p. 50):

> It appears, in fact, that the said telegraph company was but a department or bureau of the Baltimore & Ohio Railroad Company, and an agent in the name of which it made the contracts for extending its system and operating its telegraph lines.

After it had made the contract with the complainant, the railroad sold all its telegraph property to the Western Union, leaving its dummy nothing. The railroad as a defense urged that the property which it sold had never been the property of the Baltimore & Ohio Telegraph Company. The contract had been signed by the president of the telegraph company, who stated that he was employed and paid by the railroad to manage its telegraph business, and that although its president, he had no knowledge of there ever having been any meeting of persons claiming to be directors or officers of the Baltimore & Ohio Telegraph Company. The court held that the complainant was entitled to a decree against the railroad for the amount of its judgment.

This case was affirmed by the Court of Appeals for the Fourth Circuit. (54 Fed., 50.)

IV.

The absolute dismissal of the complaint after the denial of the motions to amend and to dismiss without prejudice precludes the United States from instituting any further proceedings to obtain relief.

It is important for the court to bear in mind the circumstances under which this suit, with the other five suits, was originally instituted. After the commodities clause was enacted, serious difficulties arose between the Government and the railroads regarding the constitutionality of the act and its correct interpretation. Under these circumstances, as this court stated in the opinion, the United States commenced proceedings "with the object and purpose of settling the differences between it and the defendants concerning the meaning of the commodities clause and the power of Congress to enact it as correctly interpreted, and upon this view the proceedings were heard below by submission upon the pleadings." (213 U. S., 418.)

Before the cases were heard in the lower court counsel for all parties entered into an agreement expressly stipulating that the submission of the case on bill and answer should in no wise prejudice the parties in any suit or proceeding hereafter instituted. That stipulation reads as follows (Rec., p. 86):

> It is stipulated and agreed between counsel in the above cause that its submission on bill and answer and any averment or admission in the pleading of either party contained shall

in no wise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted, and shall be operative and take effect only with respect to the present suit and for the purposes thereof.

CHARLES J. BONAPARTE,
Attorney General.
JOHN G. JOHNSON,
Atty. for Deft.
ROBERT W. DE FORREST,
Atty. for Deft.

After the filing of the stipulation quoted above, the Attorney General filed in the Circuit Court the following statement (Rec., p. 87):

> The complainant in this cause hereby joins issue with the defendant, Lehigh Valley Railroad Company, and will submit the cause, by permission of the court, on bill, answer, and the stipulation and agreement between counsel in said cause filed.
>
> CHARLES J. BONAPARTE,
> *Attorney General.*

Unless this court holds that a railroad company can not, under any circumstances, have an interest direct or indirect in the coal of the company in which it owns all of the stock, the decree of the lower court must be reversed. The absolute dismissal bars the United States from instituting any further proceedings in respect to the same cause of action. The alleged cause of action of the United States arises from the unlawful transportation by the Lehigh Valley Railroad of the coal ostensibly owned by the Lehigh Valley Coal Company, in which coal it is charged the railroad has an interest at

the time of transportation. This was the cause of action charged in the original bill of complaint, but the Government there alleged in support of its claim facts which, in the opinion of the Supreme Court, did not establish its contention that a cause of action existed. The Government in its complaint had assumed that the transportation was unlawful simply for the reason that the railroad owned the stock of the coal company. By denying the motion of the United States for leave to file an amended complaint, the lower court prevented the United States from supplying in the record certain allegations of fact from which it would appear that the railroad had a legal or equitable interest in the coal. The absolute dismissal prevents the United States from instituting another action on another complaint and thereby presenting for the consideration of the court the question of whether the United States, if it alleges and proves additional facts, is not entitled to relief.

An absolute dismissal bars further proceedings in respect to the same cause of action.

Texas & Pacific Railway v. *Interstate Transportation Co.*, 155 U. S., 585.

Swan Land and Cattle Co. v. *Frank*, 148 U. S., 603.

Kendig v. *Dean*, 97 U. S., 423.

Durant v. *Essex Co.*, 7 Wall., 107.

House v. *Mullen*, 22 Wall., 42.

Neale v. *Neales*, 9 Wall., 1.

Northern Pacific Railroad v. *N. Dakota*, 216 U. S., 579.

Wilcox v. *Consolidated Gas Co.*, 212 U. S. 19.

In *Texas & Pacific Railway* v. *Interstate Transportation Company* (155 U. S., 585) a bill in equity was filed to enjoin acts tending to impair a bridge owned by complainant. The lower court dismissed the bill without prejudice to complainant's right to institute any action it might have at law. Pending the appeal, conditions changed so that an injunction was no longer necessary. This court held that the complainant would have been entitled to a decree if conditions had not changed, but that in view of the changed conditions an injunction was unnecessary. In order that the complainant might not be shut out of the equity court in case injury to the bridge should be threatened in the future, this court amended the decree of the court below dismissing the bill, so that the decree dismissed the bill without prejudice generally. Mr. Justice Shiras said (p. 590):

> It is argued, however, on behalf of the appellants, that the course of the defendants, in demurring generally to the bill, and of the court in sustaining the demurrer and dismissing the bill, will, as a matter of precedent, leave them in a remediless position; that the decree of the court, particularly when the grounds upon which it was based are considered, would seem to wholly shut the gates of a court of equity against them, no matter how great an exigency might arise.
>
> There is force in this view, and we think the decree dismissing the bill should be without prejudice generally, and not be restricted to saving the complainant's right to bring an action at law only.

In *Swan Land & Cattle Company* v. *Frank* (148 U. S., 603) the complainant brought a suit in equity against certain stockholders of a corporation to reach assets of the corporation in payment of a claim in his favor against it. This court held that the corporation was an indispensable party, and that until the claim was reduced to judgment at law it could not be made the basis of relief in equity. The lower court erred in not dismissing the bill without prejudice. Mr. Justice Jackson said (p. 612):

> Our conclusion is that there is no error in the decree of the Circuit Court sustaining the demurrer to the bill, but we are of opinion that the bill, instead of being dismissed generally, should have been dismissed without prejudice. In *Durant* v. *Essex Company* (7 Wall., 107, 113) it is said that the general practice in this country and in England, when a bill in equity is dismissed without a consideration of the merits, is for the court to express in its decree that the dismissal is without prejudice, and that the omission of that qualification in a proper case will be corrected by this court on appeal, in support of which numerous authorities are cited. In *Kendig* v. *Dean* (97 U. S., 423, 426) the same practice was adopted.
>
> The decree must, therefore, be modified at appellants' costs, and the cause remanded with directions to dismiss the bill without prejudice, and it is so ordered.

In *Kendig* v. *Dean* (97 U. S., 423) the Circuit Court on final hearing upon the pleadings and proofs dismissed the bill. This court held that the

51

lower court had no jurisdiction to try the case because an indispensable party to the relief sought in the bill had not been made a defendant and that the dismissal should have been without prejudice. Mr. Justice Miller said (p. 426):

> The Circuit Court, although it dismissed the bill, did so on the merits, and that decree would bar the complainant from any other suit in which Dean's right to this stock might be contested. It should have been dismissed without prejudice for want of a necessary party who was not brought before the court.
>
> The decree, as in the precisely similar case of *Barney* v. *Baltimore City* (supra) and in the more recent case of *House et al.* v. *Mullen* (22 Wall., 42) must therefore be reversed, and the cause remanded with directions to dismiss the bill without prejudice; and it is so ordered.

Durant v. *Essex Company* (7 Wall., 107) was a case in which the plaintiff filed a bill for the same relief in the same matter in which he had filed a previous bill which had been finally "dismissed." This court held that the decree of dismissal was a bar to a new suit. Mr. Justice Field said (p. 109):

> The decree dismissing the bill in the former suit in the Circuit Court of the United States being absolute in its terms, was an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of

> jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as "without prejudice" or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits.
>
> Accordingly, it is the general practice in this country and in England, when a bill in equity is dismissed without a consideration of the merits, for the court to express in its decree that the dismissal is without prejudice. The omission of the qualification in a proper case will be corrected by this court on appeal.

In *House* v. *Mullen* (22 Wall., 42) the bill was demurred to on several grounds and the lower court dismissed the bill generally. This court held that the only defect in the bill was a misjoinder of parties in that the bill did not show that one of the parties had any interest in the subject matter of the litigation; as there were other grounds stated in the demurrer which would, if sustained, have been a bar to any other suit and as the decree of the lower court sustaining the demurrer did not state on which of the grounds stated in the demurrer the bill was dismissed, this court reversed the decree of the lower court, saying (by Mr. Justice Miller, p. 47):

> If the decree had dismissed the bill without prejudice, or had stated as the ground of dismissal the misjoinder of parties, for want of

> interest in two of them, we would have affirmed it, but, to prevent what may be a great injustice, we must reverse the present decree and remand the case, with directions to allow plaintiffs to amend their bill, as they may be advised, and if they fail to do this within a reasonable time, to dismiss it without prejudice.

In *Wilcox* v. *Consolidated Gas Company* (212 U. S., 19, 55) and *Northern Pacific Railway Company* v. *North Dakota* (216 U. S., 579) this court held that the bills should be dismissed without prejudice to the right of the complainant to bring another action after the rates went into effect, if the rates then proved to be confiscatory. In the Northern Pacific case Mr. Justice Holmes said that the decree below dismissing the bill should be affirmed "without prejudice to the right of the railroad company to reopen the case by appropriate proceedings, if after adequate trial it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

After the Circuit Court had denied the motion of the Government to amend its pleading, it was clearly in error for that court to dismiss the case absolutely. In asking leave to file an amended complaint the Government followed the practice which had been sustained by this court in *Rio Grande Dam, etc., Co.* v. *United States* (215 U. S., 266). That case came three times to the Supreme Court. (174 U. S., 690; 184 U. S., 416.) The object of the suit by the United States was to obtain a decree enjoining the defendants from constructing a dam

across the Rio Grande River. This court first reversed a judgment of the lower court dismissing the bill, with instructions to inquire whether or not the intended acts of the defendant in constructing the dam would substantially diminish the navigability of the Rio Grande River. (174 U. S., 690, 708, 710.) The United States then made a motion in the lower court for an extension of time in order to present additional evidence. This was denied. When the case came again to this court (184 U. S., 416), this court held that the record did not contain evidence of a material character and that the absence of such evidence was due to the action of the trial court in not giving sufficient time to the Government to prepare its case. Mr. Justice Harlan said (p. 424):

> We can not resist the conviction that if we proceed to a final decree upon the present record, great wrong may be done to the United States, as well as to all interested in preserving the navigability of the Rio Grande.

The court then remanded the case "to grant leave to both sides to adduce further evidence."

After the case had been again reinstated on the docket of the court of original jurisdiction, the United States, by leave of that court, filed a supplemental complaint setting out additional facts. The defendant subsequently moved to vacate the order allowing the supplemental bill to be filed. When the case came before this court the third time (215 U. S., 266) this court held that the lower court

had committed no error in permitting the filing of the supplemental bill. Mr. Justice Harlan said (p. 275):

> When the Government asked to file its supplemental bill the suit was of course reinstated on the docket of the court of original jurisdiction for such action as might be proper or necessary. The case having been opened that further evidence might be produced, it was certainly open for an amendment of the original pleadings or for such additional pleadings as might be appropriate to the issues between the parties. The parties were not limited to the production merely of evidence. The defendants, in the discretion of the court, could have been allowed, upon a proper showing and before taking further proof, to amend their pleadings, and equally the Government, before taking further proof, could have been allowed to file a supplemental complaint. (*Marine Ins. Co.* v. *Hodgson*, 6 Cranch, 206, 218.) Besides, subsection 87 of the New Mexico Civil Code would seem to be broad enough to cover the question of power. It provides: "A party may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the cause, or praying for any other or different relief, order or judgment." The facts set forth in the supplemental complaint were manifestly not foreign to the Government's original cause of action. In every substantial sense those facts were material. Strictly speaking, they may have constituted new matter, but they did not present

a new cause of action. (*Jenkins* v. *International Bank of Chicago*, 127 U. S., 484.) They grew out of and were connected with the same transaction from which this litigation arose, and were germane to the object of the suit. That object was to restrain the defendants from constructing and maintaining dams, reservoirs, canals or ditches that would obstruct the navigable portion of the Rio Grande River. If all the grounds of relief set out in the supplemental complaint did not exist when the original complaint was filed, they were alleged to exist when the supplemental complaint was tendered, and being connected with the original cause of action, it was right to bring them, in proper form, to the attention of the court when determining whether the Government was entitled to the relief it asked. So the supreme court of the Territory held, and so we hold. There was, plainly, no abuse of discretion or of the established rules of practice in permitting the supplemental complaint to be filed. The allowance of amendments of equity pleadings must "at every stage of the cause, rest in the discretion of the court; and that discretion must depend largely on the special circumstances of each case." (*Hardin* v. *Boyd*, 113 U. S., 756, 761.)

See also *Marine Ins. Co.* v. *Hodgson* (6 Cranch, 206); *In re Sanford Fork & Tool Co.* (160 U. S., 247, 256); *Neale* v. *Neales* (9 Wall., 1); *Ex parte French* (91 U. S., 423); Elliott on Appellate Procedure, section 577, page 490; *Perry* v. *Burton* (Illi-

nois) (18 N. E., 653); *Green* v. *City of Springfield* (Illinois) (22 N. E., 602).

In the case at bar, the Government, after the denial of its motion to amend, moved for a dismissal without prejudice, the purpose being to file the amended bill of complaint as an original complaint in a new action.

For these reasons it is respectfully submitted that the judgment of the Circuit Court should be reversed.

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WADE H. ELLIS,
EDWIN P. GROSVENOR,
Special Assistants
to the Attorney General.

APPENDIX A.

THE UNITED STATES EX REL. THE ATTORNEY GENERAL OF THE UNITED STATES *v.* DELAWARE AND HUDSON COMPANY.

SAME *v.* ERIE RAILROAD COMPANY.

SAME *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY.

SAME *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

SAME *v.* PENNSYLVANIA RAILROAD COMPANY.

SAME *v.* LEHIGH VALLEY RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

THE UNITED STATES, APPELLANT, *v.* DELAWARE AND HUDSON COMPANY.

SAME *v.* ERIE RAILROAD COMPANY.

SAME *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY.

SAME *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

SAME *v.* PENNSYLVANIA RAILROAD COMPANY.

SAME *v.* LEHIGH VALLEY RAILROAD COMPANY.

72058—11——5

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Nos. 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570. Argued January 19, 20, 1909.—Decided May 3, 1909.

MR. JUSTICE WHITE delivered the opinion of the court.

We dismiss for the present a contention made by one of the corporations that it is not a railroad company within the meaning of that term as used in the statute, which we shall have occasion to consider, because it is merely a coal company whose transporting operations are but incidental to its mining operations. With this contention put aside, it is true to say, speaking in a general sense, that the corporations, parties to this record, by means of railroads owned and operated by them, were engaged in transporting coal from the anthracite coal fields in Pennsylvania to points of market for ultimate delivery in other States. With much of the coal so transported the corporations had been or were connected by some relation distinct from the association which was necessarily engendered by the transportation of the commodity by the corporations as common carriers in interstate commerce. While the business of the corporations, generally speaking, had these characteristics, there were differences between them. Some of the corporations owned and worked mines and transported over their own rails in interstate commerce the coal so mined, either for their own account or for the account of those who had acquired title to the coal prior to the beginning of the transportation. Others, while operating railroads not only owned but also leased and operated coal mines, and carried the coal produced from such

mines in the same way. Again, others of the railroad companies, although not operating mines, were the owners of stock in corporations engaged in mining coal, the coal so produced by such corporations being carried in interstate commerce by the railroad companies holding the stock in the producing coal companies, either for account of the producing corporations or for persons to whom the coal had been sold at the point of production prior to the beginning of interstate commerce. This, moreover, was, additionally, the case as to some of the railroad companies who, as we have previously stated, were engaged both in the production of coal from mines owned by them and in interstate transportation of such product. All the attributes thus enjoyed by the corporations had been possessed by them for a long time and were expressly conferred by the laws of Pennsylvania, and, in some instances, also by the laws of other States, in which the companies likewise, in part, carried on their business. We insert in the margin a summary which the court below made concerning the situation of the respective corporations, taken from the answer or return made by each corporation.[1]

[1] It is admitted, generally, by the defendants, that the allegations in the bills and petitions, as to their corporate existence, are true, and that they own or operate railroads engaged in the interstate transportation of coal from the anthracite region of Pennsylvania. They also admit that this transportation has been carried on by the several defendants long prior to the 8th day of May, 1906, and in the case of some of them, for a period varying from a quarter to more than half a century prior thereto. In addition to these general admissions, detailed statements are made by the defendants, respectively, of the character and extent of the ownership or other interests possessed by them in the coal so transported or in the lands or mines from which it is produced. It is only necessary to briefly summarize these statements:

(1) The Delaware and Hudson Company alleges that it directly owns its coal lands as it does its railroad; that it was incorporated by an act of the Legislature of the State of New York April 23, 1823, and was "authorized

After the first day of May, 1908, the Government of the United States commenced these proceedings by bill in equity against each of the corporations to enjoin each from carrying in interstate commerce any coal produced under the circumstances which we have stated. At the same time a petition in man-

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to construct a canal or water navigation from the anthracite coal district in Pennsylvania to Hudson River in New York; to purchase lands in Pennsylvania containing stone or anthracite coal; and to employ its capital in the business of transporting to market coal mined from such lands." That this authority was also expressly conferred by acts of the Legislature of the State of Pennsylvania, between the years 1823 and 1871, and that these acts of the State of Pennsylvania resulted from the desire and policy of said State to create and foster the industry of mining such coal and developing the transportation thereof; that under the authority of these statutes of Pennsylvania and of New York, the said defendant, beginning as early as the year 1825, invested its capital in the purchase of a large quantity of coal lands in the State of Pennsylvania and in the construction of canal navigation in Pennsylvania from the Delaware River to the Hudson River; that later, under statutes of both States, it invested additional capital in the construction of railroads, in the State of Pennsylvania, and in the construction and acquisition of railroads and leasehold estates in the State of New York, for the same general purpose of transporting coal from the coal lands owned by it; that it has invested large sums of money, not only in the acquisition of coal property, but in the erection of structures for mining and terminal facilities; that some of its coal properties were acquired under leases upon royalties payable to the lessors for each ton of coal mined, the leases fixing large minimum amounts by way of rent; that large fixed rentals are required to be paid, not only for those mining lands but for railroads acquired for the purpose of transporting coal; that there are three coal companies whose shares are practically all owned by it, viz, The Northern Coal and Iron Company, The Jackson Coal Company, and The Hudson Coal Company; that its mining lands thus owned and acquired are located upon or contiguous to the railroads of defendant; that said railroads are the only reasonable, practical, and conveniently available avenues of transportation whereby the coal by it produced can be transported in interstate commerce, and the coal mined by the defendant and by said coal companies upon its lines of railroad amounts approximately to 70 per cent of the entire transportation by it, or to about 4,300,000 gross tons, its daily shipments averaging about 12 trains of 37 coal cars each; that the coal lands so acquired by the defendant and by said three coal companies would have little, if any, value, except for the mining of coal therefrom and its sale as a commercial commodity, and that if it is deprived, by virtue of the said act of Congress, of the right to transport said coal, it will be deprived of the only possible enjoyment of its property. It further avers that it is not a "railroad company" within the meaning of the act of Congress, but that it is a coal com-

damus was filed against each corporation, seeking to accomplish the same result. Both the equity causes and the mandamus proceedings were based upon the assumption that the first section of the act to regulate commerce, as amended and reenacted by the law usually referred to as the Hepburn Act, approved

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pany, and that since the year 1870 it has become, incidentally, to its business as a coal mining company, a common carrier by railroad of passengers and property.

It is further averred, as a special ground of defense by the said Delaware and Hudson Company, that this said "commodities clause" does not apply to it because all the coal mined by it upon its own lands, and upon the lands of the said three coal companies (except as to steam sizes, as thereafter stated) "is sold, before transportation thereof begins, by said company to third persons at the mines in Pennsylvania from which such coal has been produced, and that said company does not, at the time when the same is so transported by it in interstate commerce, own the same nor any interest therein, direct or indirect, apart from its obligation and rights as a common carrier in the transportation thereof, and that it carries said coal for the account of the purchaser thereof, who is the consignor and owner of said coal.

(2) The answer of the Erie Railroad Company states that it was originally organized under the laws of the State of New York in 1832; that it has been reorganized from time to time under mortgage foreclosure; and, finally, in November, 1895, under a foreclosure sale, it was reorganized under the statutes of New York, whereby it "became the lawful owner of the property, rights, privileges, immunities, and franchises of all its predecessors aforesaid, including the shares of capital stock of coal companies and of railroad companies, as well as the railroads theretofore held and possessed by said predecessor companies, the railroads so owned by it and its said subsidiary companies having an aggregate mileage of over 2,100 miles in the States of New York, Pennsylvania, New Jersey, Ohio, Indiana, and Illinois;" that the Pennsylvania Coal Company was created a corporation by the laws of Pennsylvania in 1838, its charter giving it the right of "transacting the usual business of companies engaged in mining, transporting to market, and selling coal and the other products of coal mined;" and for that purpose it was given the power to purchase or lease coal lands in Pennsylvania; also the power to construct railroads with one or more tracks. In 1853 the said Pennsylvania Coal Company was authorized to extend its railroad to connect with the New York and Erie Railroad. The right of said Pennsylvania Coal Company to buy coal lands and build railroad connections was continued by acts of the legislature of Pennsylvania in 1857, 1864, 1867, and 1868; that in pursuance of these various acts of the legislature, the Pennsylvania Coal Company obtained capital, issued stock therefor, acquired coal lands, developed coal mines, produced, transported to markets, and sold coal; built and operated railroads, made railway connections as authorized, and did other like acts to promote the business of supplying all

June 29, 1906, c. 3591, 34 Stat., 584, contained a provision, generally known as the commodities clause, which caused it to be illegal for the corporations after May 1, 1908, to transport in interstate commerce coal with which the railroad companies were or had been connected or associated in any of

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persons needing the same with anthracite coal. The Hillside Coal and Iron Company was organized by an act of the legislature of the State of Pennsylvania in 1869 for the purposes and with powers similar to those of the Pennsylvania Coal Company. Under authority of acts of the legislature of Pennsylvania the said Erie Railroad Company, long prior to the passage of said amendment to the interstate commerce act, acquired substantially all the capital stock of said Pennsylvania Coal Company, the Hillside Coal and Iron Company, the Jefferson Railroad Company, and Erie and Wyoming Railroad Company, and a small minority of the stock of the Temple Iron Company; and has pledged the same under various mortgages, pursuant to which have been issued and are now outstanding bonds for large sums, aggregating many millions of dollars, which bonds are held by purchasers in good faith and for value throughout the world; that for many years prior to May 1, 1908, it has been engaged in transporting the coal of said corporations to markets outside the State of Pennsylvania, many of which can only be reached from the railroad lines of this defendant; that the coal so transported amounts annually to several millions of tons and constitutes 22 per cent of the entire freight tonnage of this defendant, the Erie Company. It also denies that it is, by reason of the ownership of said stock in said companies, the owner in whole or in part, of the coal transported by it in interstate commerce, or that it has or had any interest, direct or indirect therein, and therefore has not violated or failed to comply with the so-called "commodities clause" of the interstate-commerce act.

(3) The Central Railroad Company of New Jersey avers that it was organized under the laws of the State of New Jersey, and by these laws was authorized to purchase and hold the stock or securities of any other corporation, of New Jersey or elsewhere, and that it was also so authorized by two acts of assembly of the State of Pennsylvania, one of which, approved April 15, 1869, was entitled "An act to authorize railroad and canal companies to aid in the development of coal, iron, lumber, and other material interests of this Commonwealth;" that pursuant to the authority of these several acts, it had, long prior to the said act of Congress, become the owner of a majority of the shares of the capital stock of the Honeybrook Coal Company and of the Wilkesbarre Coal and Iron Company, both companies now being merged into the Lehigh and Wilkesbarre Company, a large majority of whose shares are owned by it; that it also owns a minority of the shares of the Temple Iron Company; that in 1871 it became the lessee of the Lehigh and Susquehanna Railroad, a Pennsylvania corporation, which it has ever since operated under an obligation to pay a yearly rental of not less than $1,414,400 and not to exceed $2,043,300 per annum; that its gross earnings from the

the modes above stated. Except as we have said, in the particular that one of the corporations claimed that it was not a railroad company within the meaning of the commodities clause, they all defended substantially upon the ground that when correctly interpreted the commodities clause did not forbid the

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transportation of coal amounted, for the year ending June 7, 1907, to $9,312,268.04, being 48 per cent of its entire freight receipts; and that a large part of its earnings from freight and miscellaneous passenger traffic is incident to and dependent upon the operation of the mines and collieries of said coal companies; and that the greater part of its earnings from transportation of coal comes from its carriage of the coal mined by the Lehigh and Wilkesbarre Coal Company; and that large sums of money have been expended by it in extending its lines and in constructions to enable it to transport said coal in interstate commerce.

(4) The Delaware, Lackawanna and Western Railroad Company, like the Delaware and Hudson Company, admits that it is the owner of coal lands and mines coal which it sells; that it was organized under an act of the Legislature of Pennsylvania in 1849; that all the lines of railroad owned by it are wholly within the State of Pennsylvania, extending from the Delaware River, at the boundary line of the State of New Jersey, in a northwesterly direction across the State of Pennsylvania to the boundary line between the State of Pennsylvania and the State of New York, with a branch line extending from Scranton, in the State of Pennsylvania, to Northumberland, in said State. Said defendant also admits and alleges that, under express authority of acts of the Legislature of the States of Pennsylvania, New Jersey, and New York, it, as lessee, now operates, and long prior to May 1, 1908, has operated, various lines of railroad in the two last-mentioned States, by which it has direct traffic connection with the city of Buffalo and other cities in the said States. Defendant also admits that for many years it has owned in fee extensive tracts of coal land in the State of Pennsylvania; that it has also leased large tracts of coal land in the said State, and is now engaged, and for many years last past has been engaged, in mining coal from the lands so owned and leased by it; that the holding of said lands, whether in fee or by lease, and the mining, manufacture, and interstate transportation of the coal thereform, has been and continues to be, under and by virtue of the authority of the laws of the State of Pennsylvania.

That in addition to the foregoing, certain coal companies, organized from time to time under acts of assembly of the said State of Pennsylvania, have been merged into said defendant corporation; that by an act of the general assembly of the State of Pennsylvania, approved April 15, 1869, entitled "An act to authorize railroad and canal companies to aid in the development of the coal, iron, lumber, and other material interests of this Commonwealth," the defendant was authorized to aid corporations authorized by law to develop coal, iron, lumber, and other material inter-

interstate commerce traffic in coal by them carried on. If it did, the clause was assailed as inherently repugnant to the Constitution, because the right to enact it was not embraced within the authority conferred upon Congress to regulate commerce. In addition it was contended that even if, abstractly con-

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ests of Pennsylvania, by the purchase of their capital stock or bonds, or either of them. The answer of said defendant also alleges that, by reason of its ownership of said coal lands and coal, and the revenues derived from the transportation of the same to market, it has been enabled to expend millions in the betterment of its general transportation facilities for both goods and passengers, and give to the public the benefits of a well constructed and equipped modern railroad.

That by virtue of leases of railroads, to enable it to transport coal in interstate commerce, it has become bound to pay yearly, in interest charges, the sum of $5,155,697, and for taxes $1,163,916. That out of a total of about 8,700,000 tons of coal produced by it in the year 1907 from its lands owned in fee and leased, upwards of 6,700,000 tons were transported over its lines of railroad in interstate commerce; that from 40 per cent to 60 per cent of its annual transportation earnings, from the operation of leased lines, has been derived from the carriage of its own coal thereover.

That it uses, in the conduct of its business as a common carrier, approximately 1,700,000 tons of anthracite coal, of pea size or smaller, annually and will require more for such use in the future; that to obtain this coal in these economic sizes it is necessary to break up coal, leaving the larger sizes, which must be disposed of otherwise; that great waste would result if it were frobidden to transport to market in interstate commerce these larger sizes thus resulting.

That defendant's rights to acquire its holding of coal land, its rights to own and mine coal and to transport the same to market in other States as well as in Pennsylvania, and its leases of other railroads, were acquired many years prior to the enactment of the so-called "interstate commerce act," and of the said amendment thereto, known as the "commodities clause."

(5) The answer of the Pennsylvania Railroad Company avers that it was incorporated under the laws of the State of Pennsylvania April 13, 1846; that as early as 1871, under authority of two general statutes of the State of Pennsylvania, it became the owner of all the shares of the Susquehanna Coal Company, of all the shares of the Summit Branch Mining Company, and of one-third of the shares of the Mineral Railroad Mining Company, corporations of the State of Pennsylvania; that since the last-mentioned year, and up to the present time, it has carried the coal produced from the mines of the said coal companies, at lawfully established schedule rates, over its lines of railroad; that approximately 65 per cent of the coal so mined has been carried to destinations outside the State of

sidered, the clause might be embraced within the grant of power to regulate commerce, nevertheless its provisions were in conflict with the due process clause of the fifth amendment to the Constitution, because of the destructive effect which the enforcement of its provisions would produce on the rights of property

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Pennsylvania; that it mines no coal, but that the coal it carries is mined by the said coal companies, and that it has no interest therein within the meaning of the said act of Congress, either direct or indirect; that the most largely producing of the properties belonging to these coal companies are located either directly upon, or so contiguous to the system of railroads operated by said defendant as to render transportation by any other railroads not reasonably practicable.

(6) The answer of the Lehigh Valley Railroad Company states that it was originally incorporated September 20, 1847, under the laws of the State of Pennsylvania. Under the authority of various acts of Assembly of the said State, other railroad and coal companies, prior to the year 1874, have been merged into it, some of which railroads were expressly authorized to construct railroads and to carry on the business of mining, transporting, and vending coal. It is also the lessee of railroads in Pennsylvania; that by means of its own and of said leased lines of railroad it conducts, and for many years has conducted, an interstate transportation of coal; that since 1872, pursuant to authority conferred by the laws of Pennsylvania, it has also owned the majority of the capital stock of the New York and Middle Coal Field Railroad and Coal Company, a corporation of the State of Pennsylvania; also the entire capital stock of Coxe Bros. & Co., a corporation of said State; a minority interest in the capital stock of the Highland Coal Company; a majority of the stock of the Locust Mountain Coal and Iron Company; a minority interest in the capital stock of the Packer Coal Company and of the Temple Iron Company, all corporations of the State of Pennsylvania, organized for the purpose of mining coal, some of them more than a half century ago; that it has constructed lines of railroad and branch railroads and terminal facilities for the purpose of transporting to market, in interstate commerce, the coal of the companies whose shares it owns, and this business has been conducted by it for many years; that practically said coal can be transported to market only by its railroads; that the capital stock of two of the coal companies owned by said defendant has been transferred to a trustee, to hold under a general mortgage executed by defendant, under which mortgage bonds to the amount of $23,539,000 have been issued by said defendant and are now outstanding in the hands of the public; that the capital stock of Coxe Bros. & Co., Inc., owned by this defendant as aforesaid, has been transferred and assigned to and is now held by, a trustee under a collateral trust agreement executed by said defendant, dated November 1, 1905, for the purpose and upon the terms expressed in said agreement, a copy of which is annexed to said answer, and that bonds to the amount of $18,000,000 have been issued under said agreement and are

which the corporations possessed and had long enjoyed under the sanction of valid State laws. It was besides insisted that in any event the clause was repugnant to the Constitution, because of the discrimination caused by the exception as to timber and the manufactured products thereof. The cases were submitted on the pleadings, and were heard and decided at one and the same time. Treating the clause as having the meaning which the Government contended for, the court came to consider the alleged repugnancy of the enactment to the Constitution. In the principal opinion the subject was at least formally approached, not for the purpose of deciding whether inherently the commodities clause was within the competency of Congress to enact as a regulation of commerce, but whether the provisions of that clause were repugnant to the Constitution because of the destructive effect of its prohibitions upon the vast sum of property rights which the cor-

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now outstanding in the hands of the public; that said defendant transports annually, in interstate commerce, upward of 7,600,000 tons of anthracite coal, shipped by the said coal companies whose stock is owned by said defendant, in whole or in part as aforesaid, and transports annually for said coal companies, wholly within the State of Pennsylvania, upward of 1,500,000 tons; that nearly 42 per cent of its gross annual earnings of $36,068,431 for the last fiscal year, or $15,010,899, were derived from coal freights, which represented over 51 per cent of its entire freight tonnage; that the greater part of its gross earnings from coal transportation was received from the coal companies whose shares are by it owned; that the mines and collieries of said coal companies are all so located in the portions of the coal fields tributary to its lines of railroad that no means of transporting their product can be made available except by defendant's railroads; that the railroad lines of this defendant have been from time to time extended, the control of other railroads acquired, and its facilities and equipment increased at enormous expense, in reliance upon the rights and franchises conferred by the statutes of Pennsylvania aforesaid; that a very large part of defendant's earnings is derived from the freight and passenger traffic incidental to and dependent upon the operation of the mines and collieries of said coal companies, and that if said defendant were deprived of the earnings derived from the transportation of the coal of said coal companies its business could not be continued except at a net loss of many millions of dollars per annum.

porations were found to enjoy as a result of valid State laws. In this aspect the issue which the court deemed it was called upon to determine was thus by it epitomized:

> The fundamental and underlying question, however, which presents itself at the threshold of all the cases for our consideration is whether the so-called commodities clause amendatory to the act to regulate commerce, passed June 29, 1906, so far as its scope applies by the universality of its language to the cases here presented, is in excess of the legislative authority granted to Congress by the Constitution. This question must be considered with reference to the Constitution as a whole and in relation to the agreed facts of the several cases. It is therefore necessary to keep in mind the situation as presented by these defendants, the facts set forth in their individual answers as above briefly summarized and the relevant industrial conditions which being matters of common knowledge may be judicially noticed.

The situation which it was considered should be kept in mind for the purpose of passing upon the constitutional question was thus stated:

> The general situation is that for half a century or more it has been the policy of the State of Pennsylvania, as evidenced by her legislative acts, to promote the development of her natural resources, especially as regards coal, by encouraging railroad companies and canal companies to invest their funds in coal lands, so that the product of her mines might be conveniently and profitably conveyed to market in Pennsylvania and other States. Two of the defendant corporations, as appears from their answers, were created by the Legislature of Pennsylvania, one of them three-quarters of a century ago and the other half a century

ago, for the expressed purpose that its coal lands might be developed and that coal might be transported to the people of Pennsylvania and of other States. It is not questioned that pursuant to this general policy investments were made by all the defendant companies in coal lands and mines and in the stock of coal-producing companies, and that coal production was enormously increased and its economies promoted by the facilities of transportation thus brought about. As appears from the answers filed, the entire distribution of anthracite coal in and into the different States of the Union and Canada for the year 1905 (the last year for which there is authoritative statistics) was 61,410,201 tons; that approximately four-fifths of this entire production of anthracite coal was transported in interstate commerce over the defendant railroads, from Pennsylvania to markets in other States and Canada, and of this four-fifths, from 70 to 75 per cent, was produced either directly by the defendant companies or through the agency of their subsidiary coal companies.

It also appears from the answers filed that enormous sums of money have been expended by these defendants to enable them to mine and prepare their coal and to transport it to any point where there may be a market for it. It is not denied that the situation thus generally described is not a new one, created since the passage of the act in question, but has existed for a long period of years prior thereto, and that the rights and property interests acquired by the said defendants in the premises have been acquired in conformity to the constitution and laws of the State of Pennsylvania, and that their right to enjoyment of the same has never been doubted or questioned by the courts or people of that Commonwealth, but has been fully recognized and protected by both.

It was decided that, as applied to the defendants, the commodities clause was not within the power of Congress to enact as a regulation of commerce. (164 Fed. Rep., 215.) A member of the court dissented and expressed his reasons in a written opinion. Without adverting to all the reasoning expounded in that opinion, we think it accurate to say that in a large and ultimate sense it proceeded upon the assumption that, as the commodities clause provided, to quote the summing up of the opinion, for "the divorce of the dual relation of public carrier and private transporter," it was a regulation of commerce, and as such was within the power of Congress to enact, and when enacted was operative upon the defendants, and therefore required them to conform to the regulation, even although to do so might in some way indirectly affect valid rights derived from prior State legislation.

Judgments and decrees were entered denying the applications for mandamus and dismissing the bills of complaint.

The text of the commodities clause upon which the cases depend is as follows:

> From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

The Government insists that this provision prohibits railroad companies from transporting in interstate commerce articles or commodities other than the excepted class, which have been manufactured, mined or produced by them or under their authority, or which they own or may have owned in whole or in part, or in which they have or may have had any interest, direct or indirect. These prohibitions, it is further insisted, apply to the transportation by a railroad company in interstate commerce of a commodity which has been manufactured, mined or produced by a corporation, in which the transporting railroad company is a stockholder, irrespective of the extent of such stock ownership. This construction of the provision rests not only upon the meaning which the Government insists should be given to its text, but on the significance of the text as illumined by what it is insisted was the result intended to be accomplished by the enactment of the clause. The purpose, it is contended, was not merely to compel railroad companies to dissociate themselves before transportation from articles or commodities manufactured, mined, produced or owned by them, etc., but moreover to divorce the business of transporting commodities in interstate commerce from their manufacture, mining, production, ownership, etc., and thus to avoid the tendency to discrimination, forbidden by the act to regulate commerce, which, it is insisted, necessarily inheres in the carrying on by a railroad company of the business of manufacturing, mining, producing or owning, in whole or in part, etc., commodities which are by it transported in interstate commerce.

The construction relied on is thus summed up in the argument of the Government: "It (the clause)

forbids the carrier, who owns the mines and sells coal, to transport that coal in interstate commerce. * * * This is not trifling with the question. It states the exact fact and the reality." And, in accordance with this principle, the insistence in argument is that it was the duty of the carrier who owned and worked coal mines, or who had stock in such mines, or who owned coal, in order to bring themselves within the law, to dispose absolutely of all their interest in coal-producing property, in whatever form enjoyed, and to cease absolutely from acquiring like rights in the future. It was, doubtless, because of the far-reaching effect of this construction upon the enormous property interests involved which caused the result of the provision to be thus stated in the argument for the Government: "This is undoubtedly a searching and radical law, and was meant to be so." True, the Government, in argument, suggests that the radical result of the statute may be assuaged, without violating its spirit, by limiting its prohibitions so as to cause them to apply only so long as the commodities to which it applies are in the hands of a carrier or its first vendee. But no such limitation is expressed in the statute, and to engraft it would be an act of pure judicial legislation. Besides, to do so would be repugnant to the asserted spirit and purpose of the statute which lies at the foundation of the construction upon which the Government relies.

Let us as a prelude to an analysis of the clause, for the purpose of fixing its true construction and determining the constitutional power to enact it when its significance shall have been rightly defined, point out the questions of constitutional power which will require to be decided if the construction relied upon by the Government is a correct one.

We at once summarily dismiss all the elaborate suggestions made in argument as to the alleged wrong to result from the enforcement of the clause, if it be susceptible of the construction which the Government has placed upon it. We do this because obviously mere suggestions of inconvenience or harm are wholly irrelevant, as they can not be allowed to influence us in determining the question of the constitutional power of Congress to enact the clause.

Let it be conceded at once that the power to regulate commerce possessed by Congress is in the nature of things ever enduring, and therefore the right to exert it to-day, to-morrow and at all times in its plenitude must remain free from restrictions and limitations arising or asserted to arise by state laws, whether enacted before or after Congress has chosen to exert and apply its lawful power to regulate. For our present purposes, moreover, although we may have occasion to examine the subject hereafter, we entirely put out of view all the contentions based upon the assumption that even, although the provisions of the clause be in and of themselves lawful regulations of commerce, if prospectively applied, nevertheless they can not be so considered, because of their retroactive effect upon the rights of the defendants alleged to have been secured by valid state laws. We further concede for the purpose of the inquiry we are at present making, although we may also have occasion to examine the subject hereafter, that the power of Congress to regulate commerce can be constitutionally so exerted as to compel a railroad company engaged in interstate commerce to dissociate itself in interest from the commodities which it transports in interstate commerce, even although by existing state laws the railroad company may have a lawful right

of ownership or association with the commodity upon which the regulation operates.

With these concessions in mind, and despite their far-reaching effect, if the contentions of the Government as to the meaning of the commodities clause be well founded, at least a majority of the court are of the opinion that we may not avoid determining the following grave constitutional questions: 1. Whether the power of Congress to regulate commerce embraces the authority to control or prohibit the mining, manufacturing, production or ownership of an article or commodity, not because of some inherent quality of the commodity, but simply because it may become the subject of interstate commerce. 2. If the right to regulate commerce does not thus extend, can it be impliedly made to embrace subjects which it does not control, by forbidding a railroad company engaged in interstate commerce from carrying lawful articles or commodities because, at some time prior to the transportation, it had manufactured, mined, produced or owned them, etc.? And involved in the determination of the foregoing questions we shall necessarily be called upon to decide, (*a*) Did the adoption of the Constitution and the grant of power to Congress to regulate commerce have the effect of depriving the States of the authority to endow a carrier with the attribute of producing as well as transporting particular commodities, a power which the States from the beginning have freely exercised, and by the exertion of which governmental power the resources of the several States have been developed, their enterprises fostered, and vast investments of capital have been made possible? (*b*) Although the Government of the United States, both within its spheres of national and local legislative power, has

in the past for public purposes, either expressly or impliedly, authorized the manufacture, mining, production and carriage of commodities by one and the same railway corporation, was the exertion of such power beyond the scope of the authority of Congress, or, what is equivalent thereto, was its exercise but a mere license, subject at any time to be revoked and completely destroyed by means of a regulation of commerce?

While the grave questions thus stated must necessarily, as we have said, arise for decision, if the contention of the Government, as to the meaning of the commodities clause be correct, we do not intend, by stating them, to decide them, or even in the slightest degree to presently intimate, in any respect whatever, an opinion upon them. It will be time enough to approach their consideration if we are compelled to do so hereafter, as the result of the further analysis, which we propose to make in order to ascertain the meaning of the commodities clause.

It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. (*Knights Templars Indemnity Co.* v. *Jarman*, 187 U. S., 197, 205.) And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful con-

stitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. (*Harriman* v. *Interstate Com. Comm.*, 211 U. S., 407.)

Recurring to the text of the commodities clause, it is apparent that it disjunctively applies four generic prohibitions, that is, it forbids a railroad carrier from transporting in interstate commerce articles or commodities, (1) which it has manufactured, mined or produced; (2) which have been so mined, manufactured, or produced under its authority; (3) which it owns in whole or in part, and (4) in which it has an interest, direct or indirect.

It is clear that the two prohibitions which relate to manufacturing, mining, etc., and the ownership resulting therefrom, are, if literally construed, not confined to the time when a carrier transports the commodities with which the prohibitions are concerned, and hence the prohibitions attach and operate upon the right to transport the commodity because of the antecedent acts of manufacture, mining or production. Certain also is it that the two prohibitions concerning ownership, in whole or in part, and interest, direct or indirect, speak in the present and not in the past; that is, they refer to the time of the transportation of the commodities. These last prohibitions, therefore, differing from the first two, do not control the commodities if at the time of the transportation they are not owned in whole or in part by the transporting carrier, or if it then has no interest, direct or indirect, in them. From this it follows that the construction which the Government places upon the clause as a whole is in direct conflict with the literal meaning of the prohibitions as to ownership and interest, direct or indirect. If the first two

classes of prohibitions as to manufacturing, mining or production be given their literal meaning, and therefore be held to prohibit, irrespective of the relation of the carrier to the commodity at the time of transportation, and a literal interpretation be applied to the remaining prohibitions as to ownership and interest, thus causing them only to apply if such ownership and interest exist at the time of transportation, the result would be to give to the statute a self-annihilative meaning. This is the case since in practical execution it would come to pass that where a carrier had manufactured, mined and produced commodities, and had sold them in good faith, it could not transport them; but, on the other hand, if the carrier had owned commodities and sold them it could carry them without violating the law. The consequence, therefore, would be that the statute, because of an immaterial distinction between the sources from which ownership arose, would prohibit transportation in one case and would permit it in another like case. An illustration will make this deduction quite clear: A carrier mines and produces and owns coal as a result thereof. It sells the coal to A. The carrier is impotent to move it for account of A in interstate commerce because of the prohibition of the statute. The same carrier at the same time becomes a dealer in coal and buys and sells the coal thus bought to the same person A. This coal the carrier would be competent to carry in interstate commerce. And this illustration not only serves to show the incongruity and conflict which would result from the statute if the rule of literal interpretation be applied to all its provisions, but also serves to point out that as thus construed it would lead to the conclusion that it was the intention, in the enact-

ment of the statute, to prohibit manufacturing and production by a carrier and at the same time to offer an incentive to a carrier to become the buyer and seller of commodities which it transported.

But it is said, on behalf of the Government, in view of the purpose of Congress to prohibit railroad companies engaged in interstate commerce from being at the same time manufacturers, producers, owners, etc., of commodities which they carry, despite the literal sense of some of the prohibitions they should all be construed so as to accomplish the result intended, and, therefore, their apparent divergence and conflict should be removed by construing them all as prohibiting the transportation because of the causes stated, irrespective of the particular relation of the railroad company to the commodities at the time of transportation. This suggestion, however, simply invites us, under the assumption that Congress had a particular intention in enacting the clause, to so construe the clause as to cause it to be essential to decide the grave constitutional questions which we have hitherto pointed out. On the contrary, as the prohibitions concerning ownership in whole or in part, and interest, direct or indirect, are susceptible only of the construction that the dissociation of the carrier with the products which it transports was contemplated, our duty is, if possible, to treat the other and apparently conflicting prohibitions as embracing a like purpose, and thus harmonize the provisions of the clause and prevent the necessity of approaching and passing upon the grave constitutional questions which would necessarily arise from pursuing the contrary course. This, it is urged, can not be done, since to do so would be in effect to expunge the prohibitions against manufacturing, mining and production from

the clause, as ownership in whole or in part or interest, direct or indirect, would embrace everything which could possibly have been intended to be expressed by the terms manufacturing, mining and production if the proposed reconciliation of the conflict between the prohibitions be brought about. We think, however, that a brief reference to a ruling of this court concerning the effect of the Interstate Commerce Law, prior to its amendment by the Hepburn Act, will serve to make clear the unsoundness of the proposition. The case referred to is that of the *New Haven Railroad* v. *Interstate Commerce Commission* (200 U. S., 361). In that case, after much consideration, it was held that the prohibitions of the interstate commerce act as to uniformity of rates and against rebates operated to prevent a carrier engaged in interstate commerce from buying and selling a commodity which it carried in such a way as to frustrate the provisions of the act, even if the effect of applying the act would be substantially to render buying and selling by an interstate carrier of a commodity which it transported practically impossible. In thus deciding, however, it became necessary (pp. 399, 400) to refer to rulings of the Interstate Commerce Commission construing the act to regulate commerce, made not long after the enactment of the statute, in which it was held that where interstate commerce carriers were engaged in manufacturing, mining, producing and carrying commodities in virtue of state charters authorizing them so to do, granted prior to the enactment of the act to regulate commerce, that act could not be applied without confiscation, except in so far as the requirement of reasonableness of rates was concerned. While referring

to those administrative rulings, and declaring that in view of their long standing the construction which had been thus given to the act should not be departed from, "at least until Congress has legislated on the subject" (p. 401), it was nevertheless plainly intimated that legislation which compelled a carrier, even although authorized by its charter before the passage of the act to regulate commerce to engage in the production as well as transportation of commodities, to dissociate itself before transportation from the products which it manufactured, mined or produced, would not, when enforced by proper rules and regulations, amount to confiscation. When, therefore, the subject of ownership, in whole or in part, or the interest of a carrier, direct or indirect, in the product which it transported, came to be considered, and the duty to dissociate before transportation came to be legislatively imposed, it is quite natural, in view of the prior administrative rulings and the intimations of this court, conveyed in the opinion in the *New Haven case*, to assume that the provisions as to manufacturing, mining and production, while they may be somewhat redundant, were nevertheless expressed for the purpose of leaving no possible room for the implication that it was not the intention to include ownership resulting from manufacture, mining, production, etc., even although the right to manufacture, mine and produce was sanctioned by state charters prior to the enactment of the act to regulate commerce. Looking at the statute from another point of view the same result is compelled. Certain it is that we could not construe the statute literally without bringing about the irreconcilable conflict between its provisions which we had previously pointed out, and therefore some rule of

construction is essential to be adopted in order that the statute may have a harmonious operation. Under these circumstances, in view of the far-reaching effect to arise from giving to the first two prohibitions a meaning wholly antagonistic to the remaining ones, we think our duty requires that we should treat the prohibitions as having a common purpose, that is, the dissociation of railroad companies prior to transportation from articles or commodities, whether the association resulted from manufacture, mining, production or ownership, or interest, direct or indirect. In other words, in view of the ambiguity and confusion in the statute we think the duty of interpreting should not be so exerted as to cause one portion of the statute which, as conceded by the Government, is radical and far-reaching in its operation if literally construed, to extend and enlarge another portion of the statute which seems reasonable and free from doubt if also literally interpreted. Rather it seems to us our duty is to restrain the wider, and, as we think, doubtful prohibitions so as to make them accord with the narrow and more reasonable provisions, and thus harmonize the statute.

Nor is there force in the contention that because the going into effect of the clause was postponed for a period of nearly two years, therefore the far-reaching and radical effects which the Government attributes to the clause must have been contemplated by Congress. We think, on the contrary, it is reasonable to infer, in view of the facts disclosed in the statement which we have previously excerpted, that the delay accorded is entirely consistent with the assumption that it was so granted to afford the time essential to make the changes which would be required to conform to the commands of the clause as

we have interpreted it, such as providing the facilities for dissociation by sale at the point of production before transportation or segregation by means of the organization of *bona fide* manufacturing, mining or producing corporations.

It remains to determine the nature and character of the interest embraced in the words "in which it is interested directly or indirectly." The contention of the Government that the clause forbids a railroad company to transport any commodity manufactured, mined or produced, or owned in whole or in part, etc., by a *bona fide* corporation in which the transporting carrier holds a stock interest, however small, is based upon the assumption that such prohibition is embraced in the words we are considering. The opposing contention, however, is that interest, direct or indirect, includes only commodities in which a carrier has a legal interest, and therefore does not exclude the right to carry commodities which have been manufactured, mined, produced or owned by a separate and distinct corporation, simply because the transporting carrier may be interested in the producing, etc., corporation as an owner of stock therein. If the words in question are to be taken as embracing only a legal or equitable interest in the commodities to which they refer they can not be held to include commodities manufactured, mined, produced or owned, etc., by a distinct corporation merely because of a stock ownership of the carrier. (*Pullman Palace Car Co.* v. *Missouri Pacific R. R.*, 115 U. S., 587; *Conley* v. *Mathieson Alkali Works*, 190 U. S., 406.) And that this is well settled also in the law of Pennsylvania is not questioned. It is unnecessary to pursue the subject in more detail, since it is conceded in the argument for the Government

that if the clause embraces only a legal interest in an article or commodity it can not be held to include a prohibition against carrying a commodity simply because it had been manufactured, mined or produced, or is owned by a corporation in which the carrier is a stockholder. The contention of the Government substantially rests upon the assumption that unless the words be given the meaning contended for they are without significance. That this is clearly not the case is well illustrated by the *New Haven case, supra*. In that case the Chesapeake and Ohio Railway Company it was shown at one time not only directly engaged in buying, selling and transporting coal, but subsequently, when a statute was passed in West Virginia prohibiting such dealings, it resorted to indirect methods for the continuance of its previous practice. It may well be that the very object of the provision was to reach and render impossible the successful employment of methods of the character referred to. Certain it is, however, that in the legislative progress of the clause in the Senate, where the clause originated, an amendment in specific terms, causing the clause to embrace stock ownership, was rejected, and immediately upon such rejection an amendment, expressly declaring that interest, direct or indirect, was intended, among other things, to embrace the prohibition of carrying a commodity manufactured, mined, produced or owned by a corporation in which a railroad company was interested as a stockholder, was also rejected. (1906, 40 Cong. Rec., pt. 7, pp. 7012–7014.) And the considerations just stated we think completely dispose of the contention that stock ownership must have been in the mind of Congress, and therefore must be treated as though em-

braced within the evil intended to be remedied, since it can not in reason be assumed that there is a duty to extend the meaning of a statute beyond its legal sense upon the theory that a provision which was expressly excluded was intended to be included. If it be that the mind of Congress was fixed on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it. At all events, in view of the far-reaching consequences of giving the statute such a construction as that contended for, as indicated by the statement taken from the answers and returns which we have previously inserted in the margin, and of the questions of constitutional power which would arise if that construction was adopted, we hold the contention of the Government not well founded.

We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (*a*) When the article or commodity has been manufactured, mined or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (*b*) When the carrier owns the article or commodity to be transported in whole or in part; (*c*) When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense in the article or commodity, not including therefore, articles or commodities manufactured, mined, produced or owned, etc., by a *bona fide* corpo-

ration in which the railroad company is a stockholder.

The question then arises whether, as thus construed, the statute was inherently within the power of Congress to enact as a regulation of commerce. That it was, we think is apparent, and if reference to authority to so demonstrate is necessary it is afforded by a consideration of the ruling in the *New Haven case*, to which we have previously referred. We do not say this upon the assumption that by the grant of power to regulate commerce the authority of the Government of the United States has been unduly limited on the one hand and inordinately extended on the other, nor do we rest it upon the hypothesis that the power conferred embraces the right to absolutely prohibit the movement between the States of lawful commodities or to destroy the governmental power of the States as to subjects within their jurisdiction, however remotely and indirectly the exercise of such powers may touch interstate commerce. On the contrary, putting these considerations entirely out of mind, the conclusion just previously stated rests upon what we deem to be the obvious result of the statute as we have interpreted it; that it merely and unequivocally is confined to a regulation which Congress had the power to adopt and to which all preexisting rights of the railroad companies were subordinated. (*Armour Packing Co.* v. *United States*, 209 U. S. 56.)

We think it unnecessary to consider at length the contentions based upon the due process clause of the fifth amendment. In form of statement those contentions apparently rest upon the ruinous consequences which it is assumed would be operated upon the property rights of the carriers by the enforcement

of the clause interpreted as the Government construed it. For the purpose of our consideration of the subject it may be conceded, as insisted on behalf of the United States, that these contentions proceed upon the mistaken and baleful conception that inconvenience, not power, is the criterion by which to test the constitutionality of legislation. When, however, mere forms of statement are put aside and the real scope of the argument at bar is grasped, we think it becomes clear that in substance and effect the argument really asserts that the clause as construed by the Government is not a regulation of commerce, since it transcends the limits of regulation and embraces absolute prohibitions, which, it is insisted, could not be exerted in virtue of the authority to regulate. The whole support upon which the propositions and the arguments rest hence disappear as a result of the construction which we have given the statute. Through abundance of caution we repeat that our ruling here made is confined to the question before us. Because, therefore, in pointing out and applying to the statute the true rule of construction, we have indicated the grave constitutional questions which would be presented if we departed from that rule, we must not be considered as having decided those questions. We have not entered into their consideration, as it was unnecessary for us to do so.

Without elaborating, we hold the contention that the clause under consideration is void because of the exception as to timber, and the manufactured products thereof, is without merit. Deciding, as we do, that the clause, as construed, was a lawful exercise by Congress of the power to regulate commerce, we know of no constitutional limitation requiring that such a regulation when adopted should be applied

to all commodities alike. It follows that even if we gave heed to the many reasons of expedience which have been suggested in argument against the exception and the injustice and favoritism which it is asserted will be operated thereby, that fact can have no weight in passing upon the question of power. And the same reasons also dispose of the contention that the clause is void as a discrimination between carriers.

With reference to the contention that the commodities clause is void because of the nature and character of the penalties which it imposes for violations of its provisions, within the ruling in *Ex parte Young* (209 U. S., 123) we think it also suffices to say that even if the delay which the clause provided should elapse between its enactment and the going into effect of the same does not absolutely exclude the clause from the ruling in *Ex parte Young*, a question which we do not feel called upon to decide, nevertheless the proposition is without merit, because, (*a*) no penalties are sought to be recovered in these cases, and, (*b*) the question of the constitutionality of the clause relating to penalties is wholly separable from the remainder of the clause, and, therefore, may be left to be determined should an effort to enforce such penalties be made.

There is a contention as to one of the defendants, the Delaware and Hudson Company, to which we, at the outset, referred, which requires to be particularly noticed. Under the charters granted to the company by the States of New York and Pennsylvania it was authorized to secure coal lands and mine coal, and, without going into detail, was originally authorized to construct a canal, and, ultimately, a railroad for the purpose of transporting, for its own

account, the products of its mines, and, undoubtedly, vast sums of money have been invested in carrying out these purposes. It is true also that the company is the owner of stock in various coal corporations. The claim now to be disposed of is that by the true construction of its charters the Delaware and Hudson Company is not a railroad company within the meaning of the term as used in the commodities clause, but is really a coal company. The contention, we think, is without merit. The facts stated in the excerpts from the answer and returns of the company, which we have previously placed in the margin, leave no doubt that the corporation was engaged as a common carrier by rail in the transportation of coal in the channels of interstate commerce, and as such we think it was a railroad company within the purview of the clause and subject to the regulations which are embodied therein as we have interpreted them.

As the court below held the statute wholly void for repugnancy to the Constitution, it follows from the views which we have expressed that the judgments and the decrees entered below must be reversed. As, however, it was conceded in the discussion at bar that in view of the public and private interests which were concerned, the United States did not seek to enforce the penalties of the statute, but commenced these proceedings with the object and purpose of settling the differences between it and the defendants, concerning the meaning of the commodities clause and the power of Congress to enact it as correctly interpreted, and upon this view the proceedings were heard below by submission upon the pleadings, we are of opinion that the ends of justice will be subserved, not by reversing and remanding with particular directions as to each of the defendants, but by

reversing and remanding with directions for such further proceedings as may be necessary to apply and enforce the statute as we have interpreted it. And it is so ordered.

Mr. JUSTICE HARLAN, dissenting.

As these cases have been determined wholly on the construction of those parts of the Hepburn Act which are here in question, and as Congress, if it sees fit, may meet that construction by additional legislation, I deem it unnecessary to enter upon an extended discussion of the various questions arising upon the record, and will content myself simply with an expression of my nonconcurrence in the view taken by the court as to the meaning and scope of certain provisions of the act. In my judgment the act, reasonably and properly construed, according to its language, includes within its prohibitions a railroad company transporting coal, if, at the time, it is the owner, legally or equitably, of stock—certainly, if it owns a majority or all the stock—in the company which mined, manufactured, or produced, and then owns, the coal which is being transported by such railroad company. Any other view of the act will enable the transporting railroad company, by one device or another, to defeat altogether the purpose which Congress had in view, which was to divorce, in a real, substantial sense, production and transportation, and thereby to prevent the transporting company from doing injustice to other owners of coal.

O

Supreme Court of the United States.

UNITED STATES OF AMERICA, Appellant, against LEHIGH VALLEY RAILROAD COMPANY, Respondent.	October Term, 1910. No. 536.

BRIEF FOR RESPONDENT.

Statement.

This is a suit in equity to enjoin the defendant, the Lehigh Valley Railroad Company, from transporting anthracite coal in interstate commerce, in violation of the fifth paragraph of the first section of the Interstate Commerce Act, as amended June 29, 1906, commonly called the Commodities Clause of the Hepburn Act.

The bill of complaint was filed on June 5, 1908 (R. 1). The defendant appeared the same day, and answered June 13, 1908 (R. 6-86). On June 16, 1908, issue was joined (R. 87), and the cause was argued before the Circuit Judges, Gray, Dallas and Buffington, on that same day. The cause was submitted (R. 87), on bill, answer and a stipulation (R. 86), by which it was stipulated and agreed by counsel that no averment or admission in any pleading should "prejudice the said parties in any other suit or proceeding heretofore or

hereafter instituted, and shall be operative and take effect only with respect to the present suit and for the purposes thereof."

On September 10, 1908 (R. 1), the opinion of the Court by Judge Gray was filed, in which it was held that the Commodities Clause was unconstitutional and invalid, and that the bill should be dismissed (R. 88-122). Judge Dallas filed therewith a concurring opinion (R. 122). Judge Buffington dissented (R. 124), and on October 6, 1908, filed a dissenting opinion (R. 125-134). Thereupon, on October 6, 1908, a decree was entered dismissing the bill (R. 134). See *United States v. Delaware & Hudson Co.*, 164 Fed. Rep., 215.

On the same day the Attorney General appealed to this Court (R. 136-138), assigning as errors, generally that the Circuit Court erred in dismissing the bill and refusing the injunction prayed, and also in sustaining the defendant's objections to the constitutionality of the Commodities Clause (R. 135).

Similar bills in equity had been simultaneously filed against the Delaware and Hudson Company, the Erie Railroad Company, the Central Railroad Company of New Jersey, the Delaware, Lackawanna and Western Railroad Company and the Pennsylvania Railroad Company, all railroads carrying anthracite coal in interstate commerce, and in each of the cases similar proceedings were simultaneously had. The Attorney General had also filed petitions for mandamus against each of the Companies which were simultaneously denied.

Similar appeals to the Supreme Court were taken by the Attorney General from the decrees dismissing the bills in all of the six cases, and in all of the cases similar errors were assigned. The cases were all heard together in the Supreme Court.

On May 3, 1909, the opinion of the Supreme Court in all of the cases was delivered by Mr. Justice White, in which all of the Justices concurred, except Mr. Justice Harlan (*United States v. Delaware & Hudson Co.*, 213 U. S., 366). The Supreme Court overruled certain constitutional objections to the validity of the clause, raised by the Railroad defendants, namely, because of the exception contained in the clause as to timber and because of the nature and character of the penalties imposed; and held it to be unnecessary to consider the principal constitutional objection raised, namely, that based upon the due process clause of the Fifth Amendment, because the Court so construed the Commodities Clause as to preclude the necessity of considering that constitutional question.

The cause was accordingly so remanded on June 17, 1909, and the mandate was filed in the Circuit Court on February 22, 1910, "for further proceedings in conformity with the opinion of this Court" (R. 139).

On March 7, 1910, a decree was entered in the Circuit Court setting aside the decree of October 8, 1908, dismissing the bill, and reinstating the cause upon the docket (R. 140).

The Attorney General then moved to amend the bill of complaint, and presented a proposed amended bill as a part of his motion (R. 142), which motion the Circuit Court denied (R. 140).

Thereupon the Attorney General moved for a decree dismissing the bill of complaint without prejudice, which motion the Court denied, with a written opinion (R. 147-148).

"The Court then inquired of counsel for the Government whether, in view of the premises, he desired to have the cause stand for further proceedings in this Court,

and upon his statement that the Government would not proceed any further in this Court, in view of the fact that the amendment had been disallowed," the Court thereupon, on motion of defendant's counsel and without further objection by the Attorney General, dismissed the bill absolutely upon the allegations of the bill and answer (R. 151). A decree was entered on March 7, 1910, dismissing the bill (R. 152).

The Government appeals from that decree (R. 153-4), assigning that the Circuit Court erred as follows:

1. In refusing leave to the Government to file its amended bill of complaint.

2. In denying the Government's motion to dismiss without prejudice.

3. In dismissing the bill absolutely.

4. Because the amended bill, if it had been allowed, while not stating a new cause of action, would have supplied allegations of fact to show that The Lehigh Valley Coal Company was not a *bona fide* company within the meaning of that term in the Supreme Court opinion, and was in fact but a department of the railroad, and that the coal of said coal company was in reality owned by the defendant railroad company, and so its carriage by the defendant railroad company was unlawful.

5. Because the denial of the motion to dismiss without prejudice made it impossible for the Government to bring another suit for the same cause of action.

6. Because the absolute dismissal of the bill bars the institution of a new suit for the same cause of action.

7. Because the Circuit Court held that the Supreme Court had decided that The Lehigh Valley Coal Com-

pany was a *bona fide* company, within the meaning of that term as used in the Supreme Court opinion.

8. Because the Circuit Court held that the Supreme Court had decided that the defendant had no interest, direct or indirect, in the coal ostensibly owned by the coal company.

9. Because the Circuit Court held that the Supreme Court had decided that said coal was not mined or produced under the authority of the defendant, and that the defendant had in good faith disassociated itself from said coal before transportation.

10. Because the Circuit Court held that the Supreme Court had decided that the control of the coal company by the defendant was not a mere device for evading the Commodities Clause.

11. Because the Circuit Court held that the Supreme Court had decided that the carriage of coal under the circumstances set out in the amended bill is not prohibited by the Commodities Clause.

12. Because, by refusing leave to amend, the Government was prevented from presenting the question whether The Lehigh Valley Coal Company is a *bona fide* company, within the meaning of that term, etc.

13. Because, by refusing leave to dismiss without prejudice, the Government was prevented from bringing a new bill and thereby presenting whether the carriage of the coal company's coal is prohibited by the Commodities Clause.

14. Because, by dismissing the bill, the Government was prevented from bringing a new bill and thereby presenting whether the carriage of the coal company's coal is prohibited by the Commodities Clause.

FIRST.

The appellant, by declining to proceed further in the Circuit Court for the reason that that Court would not allow the proposed amendment of the bill of complaint, waived its right to a re-hearing of the issues, and therefore by this appeal presents to this Court only these two questions: (1) Whether the Circuit Court erred in not allowing the proposed amendment? and (2) Whether the Circuit Court erred in refusing to dismiss the bill without prejudice?

When this cause was first before this Court, the defendant contended that the right to enact the Commodities Clause was not embraced within the authority conferred upon Congress to regulate commerce; and further, that, even if the clause might be embraced within the grant of power to regulate commerce, nevertheless its provisions were in conflict with the due process clause of the Fifth Amendment of the Constitution. These were the principal constitutional questions presented.

Two other constitutional points were raised by the defendant and overruled by this Court, namely, that the Commodities Clause was void because of the exception contained within it as to timber, and because of the nature and character of the penalties imposed.

As to said principal constitutional questions this Court held the statute to be susceptible of two interpretations,

one of which avoided and the other raised these grave and doubtful constitutional questions. This Court held it to be its duty to adopt that construction which would save the statute from constitutional infirmity.

The construction which the Government contended for was, that the clause forbids a railroad company to transport in interstate commerce any commodity manufactured, mined or produced, or owned in whole or in part, etc., by a corporation in which the railroad company owns a stock interest.

The opposing contention, that of the defendant, was that interest, direct or indirect, includes only commodities in which the railroad company has a legal interest, and therefore does not exclude the right to carry commodities which have been manufactured, mined, produced or owned by a separate and distinct corporation, simply because the railroad company may be interested in the producing, etc., corporation as an owner of stock therein.

This Court held that the words "interest, direct or indirect," are to be taken as embracing only a legal or equitable interest in the commodities to which they refer, and cannot be held to include commodities produced and owned by a distinct corporation, merely because of a stock ownership by the railroad company.

The construction contended for by the Government was held to be not well founded.

In concluding the opinion on this subject the Court said: "We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: * * * *c*. When the carrier at the time of transportation has an interest, direct or indirect, in a legal or

equitable sense in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced, or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder" (p. 415).

As thus construed, it was held that Congress had the power to enact the Commodities Clause; and that it became unnecessary for the Court to consider the contentions of the defendants based upon the due process amendment of the Constitution; that the consequences to the established property rights of the defendants, under the construction adopted, became immaterial. The decision was as follows: "As the Court below held the statute wholly void for repugnancy to the Constitution, it follows from the views which we have expressed that the judgments and decrees entered below must be reversed. As, however, it was conceded in the discussion at bar that in view of the public and private interests which were concerned, the United States did not seek to enforce the penalties of the statute, but commenced these proceedings with the object and purpose of settling the differences between it and the defendants, concerning the meaning of the commodities clause and the power of Congress to enact it as correctly interpreted, and upon this view the proceedings were heard below by submission upon the pleadings, we are of opinion that the ends of justice will be subserved, not by reversing and remanding with particular directions as to each of the defendants, but by reversing and remanding with directions for such further procedings as may be necessary to apply and enforce the statute as we have interpreted it" (p. 418).

The cause was duly remanded to the Circuit Court, and was duly reinstated upon the docket of that court.

Under such circumstances and conditions, the Government assumed that it was then at liberty to proceed further against the defendant in the Circuit Court, still claiming that the defendant was violating the statute, as thus construed.

The only question left in the case at that stage was, whether the defendant, the Lehigh Valley Railroad Company, was violating the Commodities Clause by carrying the coal produced and owned by The Lehigh Valley Coal Company, whose capital stock was entirely owned by the defendant, and that of other coal companies in which the defendant had stock interests, entire or part, either majority or minority, respectively.

The Government had the undoubted right to present that issue to the Circuit Court, by due proceedings in the cause in accordance with the practice of that court. The cause was neither noticed for rehearing upon bill and answer, as we believe would have been the only proper proceeding, nor was any proceeding instituted for the taking of testimony upon the issue, but an amended bill of complaint was presented to the Court and a motion was made for leave to file the same, in place of the original bill. This motion was denied by the Court. Then followed, on the same day, and without other notice, a motion made by the Government to dismiss the original bill without prejudice, which motion was also denied by the Court.

The cause was before the three Circuit Judges under the Expediting Act of February 11, 1903, (32 Stat. at Large, p. 823). Under that statute, it was entitled, on motion of the Attorney General, to precedence, and to be "assigned for hearing at the earliest practicable day." At that stage the Attorney General might have demanded a rehearing upon the original bill and answer,

or, perhaps, as preliminary thereto, noticed the taking of further testimony on the issue raised by the original pleadings, though the latter would have been opposed. Whether he could have gone outside of the stipulation already made that the cause should be submitted on bill and answer is unimportant, as he made no motion to do so. He did not even treat the fact that the parties were then represented in Court as equivalent to a hearing, for he made no motion for judgment. He was asked by the Court whether he desired to have the cause stand for further proceedings in the Circuit Court, as it was assumed the mandate of this Court provided he might have done. He answered "that the Government would not proceed any further in this Court in view of the fact that the amendment had been disallowed" (Decision, R. 151, and Decree, R. 152). This was evidently meant and understood by the Court and defendant's counsel, as a declaration by him that he would have proceeded further upon the proposed new bill, if he had been allowed to substitute it, but because of its denial he would neither take new testimony nor demand a hearing on the original bill and answer. This constituted an express waiver of the right to have the issue heard. Upon that statement and concession the defendant moved and the Court dismissed the bill. Under those conditions, the merits of the issue raised by the original bill and answer are not reviewable by this Court.

If the counsel for the Government, in answer to the inquiry of the Court, had had the cause stand for further hearing on the merits, and such hearing had taken place, undoubtedly an appeal from the decree rendered would have taken to this Court any appealable questions arising out of subsequent proceedings in the Circuit Court. The inquiry of the Court shows that no such

hearing was had, and the obvious purpose of the Court's inquiry was to afford opportunity to the Government to take further proceedings, in accordance with the mandate of this Court. The action of the Government's representative constituted a declination of that opportunity, and left the Court below with no alternative than the dismissal of the bill. The Government cannot now be heard to complain that the bill was dismissed, unless on the ground that its two motions in the Circuit Court were denied, as those were the only proceedings in the cause, subsequent to the mandate of this Court, to which its counsel did not in effect consent.

SECOND.

The complainant's motion for leave to file an amended bill of complaint was rightly denied.

(1) The general replication had been filed (R. 87), and not withdrawn. Irrespective of Equity Rule 29, with which the Government wholly failed to comply, no cause was shown for leave to file an amended bill other than that which appeared on the face of the proposed amendment itself. Nothing had occurred since the original bill was filed except that this Court had held that the Government's theory of the law was erroneous. There was no averment of after-discovered matter.

(2) The refusal of leave to amend the bill was discretionary, and is not reviewable.

In *Michigan Central Ry. Co. v. Pinkney* (149 U. S., 194, 201), the rule was stated: "It is well settled that

mere matters of procedure, such as the granting or refusing of motions for new trials, and questions respecting amendments to the pleadings, are purely discretionary matters for the consideration of the trial court, and unless there has been gross abuse of that discretion, they are not reviewable in this Court on writ of error" (*Chapman v. Barney*, 129 U. S., 677, 681; *Bullitt Co. v. Washer*, 130 U. S., 142, 145).

(3) The stipulation and agreement which had been previously entered into, that the cause be submitted on bill and answer, was still in force, and the pleadings to which it referred could not be superseded by others, merely at the desire of counsel for the Government. These proceedings were conducted, as was conceded in the discussion at bar in this Court, for the purpose of settling the differences between the parties. The answer was prepared to meet the requirements and desires of both parties, and with admissions of all facts deemed material.

(4) Leave to amend was properly denied on the merits, because the proposed amended bill contained no new allegation of fact that was not substantially charged by or that was not provable, if true, under the original bill. The new statements contained in the amendment are either in substance repetitions of the allegations of the original bill, matters of evidence of such allegations, or conclusions of law.

Paragraphs 1, 2, 6, 7, 8 and 9 of the original bill are repeated substantially in the amendment.

Paragraphs 4 and 5 of the original bill relate to those coal companies in which the defendant owned stock, other than The Lehigh Valley Coal Company, and these two paragraphs are entirely omitted from the amend-

ment, leaving the amended bill as relating only to the relations between the defendant and The Lehigh Valley Coal Company, called in the amendment "the coal company."

Paragraph 3 of the original bill, which relates to the defendant's relations with the coal company, is wholly re-written in the amendment, and contains the gist of it. If the allegations of the original and amended bills were to be placed side by side, in the style of parallel columns, it would be found that there is not a statement of fact in the amendment which is not substantially covered by the original bill, except those statements in the amendment which relate to coal purchased by the coal company, and the losses thereon alleged to be met by the defendant. But these facts, if true, would not constitute cause of action, and would be at most evidence of the control of the management of the coal company by the defendant, already so broadly alleged in the original bill.

The theory of the pleader who drafted the proposed amendment seems to have been to allege facts to sustain the proposition that the defendant has a legal or equitable interest in the coal itself, rather than in the stock of the coal company, hoping so to bring his case within the construction placed upon the Commodities Clause by this Court. But the original bill was no more deficient in this respect than the amendment. The original bill alleged broadly and sufficiently, that by its ownership of the entire capital stock of the coal company, the defendant owns the coal, and that by its control of the management of the coal company the coal was produced under the authority of the defendant, and that the coal being owned by the defendant and produced under its authority, its transportation by the defendant

is violative of the statute. It could hardly have been disputed by the defendant on a trial, that the facts set forth in the amendment, if true, would have been as entitled to admission as evidence under the original bill, as they would have been under the amendment, if it had been substituted.

THIRD.

The complainant's motion for a decree dismissing the bill of complaint without prejudice was rightly denied.

Upon the argument of complainant's motion for leave to file an amended bill, and after the motion was denied, the complainant then moved for a decree dismissing the bill of complaint without prejudice. No notice was given of this motion and the motion was supported by no affidavits. No grounds for the relief asked for were submitted to the court (R. 148, 151). The entire proceeding relative to this motion is set forth in the following recital contained in the decree denying the motion to dismiss without prejudice:

"Whereas said motion to amend was denied, and

"Whereas said complainant then moved for a decree dismissing said bill of complaint without prejudice, and said motion was duly argued by counsel for the complainant and the defendant, and duly considered, by the court;

"It is now, on this 7th day of March, 1910, ordered that said motion to dismiss without prejudice be and the same is hereby denied" (R. 148).

This informal application was directed to the discretion of the court and the denial of the application was just and entirely within the discretion of the court. As clearly set forth in the decision (R. 151), and in the recitals contained in the decree dismissing the bill (R. 152), the motion was made because the complainant's counsel took the position that "the Government would not proceed any further in this court in view of the fact that the amendment had been disallowed." In other words, the request for a dismissal without prejudice was addressed to the court at a time when, as the complainant conceded, the court must forthwith grant to the defendant a decree dismissing the bill.

As stated by Mr. Justice Peckham, in his opinion in the case of *Pullman's Car Company vs. Transportation Company*, 171 U. S., 138, 146: "Unless there is an obvious violation of a fundamental rule of a court of equity or an abuse of the discretion of the court, the decision of a motion for leave to discontinue will not be reviewed here." In that case the rule was laid down that "leave to dismiss a bill is not granted where, beyond the incidental annoyance of a second litigation upon the subject-matter, such action would be manifestly prejudicial to the defendant" (p. 146). The court cited with approval the case of *Stevens v. The Railroads*, 4 Fed. Rep., 97 at 105. In the *Stevens Case* the motion to dismiss without prejudice was opposed not because any decree had been made which prevented a dismissal, but on the ground that, "by the pleadings and the record it appears that certain defences have been made and peculiar circumstances exist which make it inequitable to allow a dismissal without a hearing on the merits, so that their rights may be declared and protected by proper decrees, both against the plaintiffs and as be-

tween the defendants themselves" (p. 98). After an exhaustive review of the authorities, Judge Hammond stated that, "the injury to the defendant must be of a character that deprives him of some substantive rights concerning his defences not available in a second suit, or that may be endangered by the dismissal, and not the mere ordinary inconveniences of double litigation, which, in the eye of the law, would be compensated by costs. Nor is it necessary to consider the suggestion that the stipulation of counsel, and the order upon it, amounts to an agreement to try or continue and not dismiss. I am satisfied that the right to dismiss is not absolute, and that this case is within the qualification mentioned' (p. 110).

The same rule is referred to in the case of *Chicago and Alton Railroad Company v. Union Rolling Mill Co.*, 109 U. S. 702, 713. The Court said: "It may also be conceded that, as a general rule, a complainant in an original bill has the right at any time, upon payment of costs, to dismiss his bill. But this latter rule is subject to a distinct and well settled exception, namely, that after a decree, whether final or interlocutory, has been made, by which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant." The Court quotes with approval the case of *Connor v. Drake*, 1 Ohio St. 170: "The propriety of permitting a complainant to dismiss his bill is a matter within the sound discretion of the court, which discretion is to be exercised with reference to the rights of both parties, as well the defendant as the complainant. After a defendant has been put to trouble in making his defence, if in the progress of the case rights have been manifested that he is entitled to claim, and which

are valuable to him, it would be unjust to deprive him of them merely because the complainant might come to the conclusion that it would be for his interests to dismiss his bill. Such a mode of proceeding would be trifling with the courts as well as with the rights of defendants. We think the Court did not err in its ruling in refusing to permit complainant to dismiss his bill" (p. 714).

A dismissal without prejudice would have seriously prejudiced the rights of the defendant. The parties had stipulated that the case be submitted on bill and answer. The defendant had prepared its answer with admissions of all facts which the complainant deemed material. Material concessions had been made in the preparation of the answer by way of admissions. It was clearly within the discretion of the Court to deny the motion for a dismissal without prejudice, which would have opened the door for the bringing of a new suit in which the complainant would have all of the advantage growing out of the admissions set forth in the answer.

In *American Bell Telephone Co. v. Western Union Telegraph Co.* (69 Fed. Rep., 666, 670), the Court said:

"The single question contested is the right of the complainants thus to dismiss their bill. To the discussion of this question great learning and extensive examination of authorities have been devoted. But in the opinion of this court the question lies in narrow compass. All the authorities recognize that in the progress of a suit a stage may be reached when the right of the complainant to end the cause by dismissing his bill ceases. With sufficient exactness, the decisive point may be said to be when the cause has proceeded so far as to give the defendant rights of which he would be deprived by allowing the dismissal of the bill by the complainant on his motion. Such rights were acquired in this cause by the

reference of the parties to the master, approved and confirmed by the decretal order of the court. The defendant, by the concurrent force of the stipulation of the parties to refer to the master 'to hear the parties, report the facts, and his rulings on any question of law arising in the case,' and of the order of court, acquired the right to have the hearing before the master, his report, and the decision of the master thereupon. Neither party could, at his pleasure, revoke or rescind the reference so made and confirmed. Even if the right of the defendant to have the cause go on was not fixed by the stipulation and the order of the court, which is not admitted, it was secured by the hearing before the master pursuant to that stipulation and order, at which the parties produced their evidence at great length, presented their arguments, and submitted the case to the master for his determination. But, further than this, the master reached a decision, and communicated it to the parties, or their counsel, before any suggestion by the complainants of a desire to dismiss their bill. It was only after it became known to them that the master's decision was in favor of the defendant, and adverse to them, that they sought to escape, and to deprive the defendant of the award of a tribunal of mutual selection."

It was entirely within the discretion of the Court to deny the motion to dismiss without prejudice, made after the case had proceeded to final decree, and after the rights of the parties had been determined, upon an appeal to this Supreme Court. The decision of this Court was that the decree be reversed and remanded with directions "for such further proceedings, as may be necessary, in conformity with the opinion of this court," and such directions were incorporated in the mandate (R. 139). Upon the facts set forth in the answer and the

allegations in the bill not denied in the answer the defendant was entitled to a decree dismissing the bill upon the merits. Upon the record and in conformity with the decision and mandate of this Court the defendant's right to a final decree was established. Complainant's counsel practically admitted this by refusing to proceed further in the case. It was clearly within the discretion of the court to refuse to deprive the defendant of this right by means of a dismissal without prejudice.

Hershberger v. Blewett, 55 Fed. Rep., 170, 171.

Flaherty vs. McCormick, 14 Northeastern Rep., 846, 850 (Supreme Court of Illinois).

Georgia Pine Turpentine Co. v. Bilfinger, 129 Fed. Rep., 131.

Ebner v. Zimmerly, 118 Fed. Rep., 818, 820.

FOURTH.

The decision of the Circuit Court was in conformity with the opinion of this Court.

As we have stated under the first point of this brief, we think that for the reasons there set forth, the only questions reviewable here are those which we have already presented. But if this Court should hold that this appeal brings up for review the question as to whether or not the decree appealed from is in conformity with the opinion of this Court, then we contend further that the decision of the Court below is in such conformity.

By this appeal the Government seems to assume that the cause was regularly brought to hearing before the

judges of the Circuit Court on bill and answer; and notwithstanding the formal announcement of its counsel that he would proceed no further, and notwithstanding that he moved for no decree, the Government seems to assume that it was the duty of the Circuit Court to decree an injunction against the defendant. Both parties obviously assented that the Court should dispose of the cause, and there were only two alternatives, either to dismiss the bill, or grant an injunction. Hence the error, if any, is that an injunction was not granted. The motion for leave to amend having been denied, an injunction could only have been granted on the bill and answer.

If the Court was under duty to examine the record, and enter a decree upon the facts, it had as the basis of a decree the express admissions of fact in the answer and the undenied allegations of the bill. These constituted the case, assuming that the case was before the Court on final hearing, and that an adjudication upon the facts was required.

The whole case on the record against the defendant is this: It owns the entire capital stock of The Lehigh Valley Coal Company, which it acquired prior to the Commodities statute, under authority conferred by the laws of Pennsylvania. The coal company created long prior to said statute owns coal lands and mines in Pennsylvania, acquired long before said statute was enacted, and is engaged in the business of producing coal therefrom, selling it, and shipping it by defendant's lines to markets in other states; as the owner of the stock of the coal company, the defendant controls the election of the directors or managers of the coal company; said coal lands and mines are operated in producing coal under the direct management of the president and directors of

the coal company; the person who is the president of the coal company is the person who is the president of the defendant; the persons who are a majority of the directors of the coal company are persons who are officers and directors of the defendant; some of the coal so produced by the coal company in Pennsylvania is loaded on defendant's cars, and is carried on its lines into other states for sale in the markets thereof. The defendant denies that its stock ownership constitutes it the owner of the said lands and mines and coal therefrom, or constitutes any interest, direct or indirect, therein; and also that the participation of persons who are its officers and directors in the management of the coal company constitutes production of the coal by the defendant or under its authority. Similar admissions and denials appear in the pleadings as to other coal companies in which the defendant holds stock, entire, majority or minority, but to repeat the separate holdings would not differentiate the case.

In order to establish its right to an injunction on the merits of the case, and consequently its right to a reversal of the decree now appealed from, it was at least incumbent upon the Government to sustain the proposition that on the conceded facts, as above set forth, it was the duty of the Circuit Court to find and hold that the defendant has a legal or equitable interest in the coal of the coal company carried by it in interstate commerce, and that the coal company is not a *bona fide* corporation, within the meaning of the opinion of this Court.

The character of a coal company,—whether it be *bona fide*, or not, within the meaning of this Court—cannot depend on the extent or proportion of the capital stock held by the railroad company. A railroad com-

pany owning three-quarters, or more than half, of the stock of a coal company controls its management through election as completely as it would by owning the entire capital stock. The fact of entire or majority ownership is, therefore, not logically more relevant to the issue of *bona fides* than minority ownership, unless this Court intended to hold that every majority holding constitutes *mala fides*. Obviously the decision of this Court is that the question of *bona fides* shall not depend on stock holding. That, as this Court said, was not the evil aimed at by Congress. Therefore, the fact admitted in the record, that the *entire* capital stock of The Lehigh Valley Coal Company is held by the defendant, becomes of no more importance than other lesser holdings of coal company stock by the defendant and other railroad companies.

Under the decision of this Court, therefore, the *bona fides* of The Lehigh Valley Coal Company cannot depend on the ownership of its stock by the defendant. It must rest on some other ground than stock ownership. On the record before the Court, the only other pertinent facts were the control of the coal company's elections, and the consequent identity of the person who is president and of the persons who are a majority of the directors of the coal company, with persons who are officers and directors of the defendant.

Now it may be asserted in the absence of other facts, that such control and identity are entirely consistent with good faith. There is no presumption that the persons acting as officers and directors, were either elected to act or ever acted with anything but perfect good faith in the relationship between the companies. On the contrary the presumption is that they acted for the coal company as coal company officers, strictly for it and in

its interest, as a genuine corporation. And without further argument we might rest at this point, on the proposition that the record contains no facts from which the Court below could have found that the coal company was not a *bona fide* corporation.

The *bona fides* in the opinion of this Court is of course the good faith of the coal company's managers with reference to the Commodities Clause, that is to say, whether the coal company is such a cloak, or shell, or device to avoid the Commodities Clause, that the Court must disregard its corporate existence in order to prevent a fraud upon the Government, and thereupon decide that the legal or equitable interest in the coal is actually in the railroad company.

That no such presumption can be deduced from the facts in the record, we have already argued. But the record positively proves the contrary. The relationship between the two companies arose and continued many years before the Commodities Clause was passed. The purpose and object of its organization is apparent. By the law of Pennsylvania a railroad company could not own and operate coal mines, but could own stock of coal companies. The organization and conduct of the coal company was the natural consequence of that state of the law. It was lawful and *bona fide*. It cannot be disputed that that condition continued at least until the Commodities Clause became the law. The relationship between the companies did not change, only the law changed, and if the subsequent relationship was one of bad faith it was rendered so by the law, and not by any act, purpose or intent of the coal company or its officers, which is an absurdity.

The relationship between the defendant and the coal company has from its inception existed under the direct

authority of law, both of the State of Pennsylvania and the Federal Government. As to the State of Pennsylvania, under whose laws the coal company was organized, it is alleged and conceded that such organization and such relationship were allowed and encouraged by the legislative policy of the State of Pennsylvania. As to the federal laws, there is the direct interpretation of the Interstate Commerce Act in the *Chesapeake and Ohio Case* (200 U. S., 361, 401), to the effect that the relationship was legal. In 1890, the Interstate Commerce Commission, in the *Haddock and Coxe Cases* (4 I. C. C. R., 296, 535), found that The Lehigh Valley Coal Company was mining and purchasing large quantities of coal and shipping it to market over the lines of the defendant. The Interstate Commerce Commission interpreted the Interstate Commerce Act to allow such relationship. Thereafter, Congress amended the Interstate Commerce Act without referring to or reversing the interpretation of the Interstate Commerce Commission. In the *Chesapeake and Ohio Case*, the Supreme Court, without expressing an opinion as to what its decision would have been on the original question, held that the decision of the Commission is "now binding, and as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least until Congress has legislated upon the subject" (p. 401). In passing the Commodities Clause, Congress legislated upon the general subject, but, as held by this Court, the prohibitions of that clause did not include commodities manufactured, mined, produced, or owned by a distinct corporation because of stock ownership by the carrier. Since the decision of this Court interpreting the Commodities Clause, section one of the Interstate Com-

merce Act has been re-enacted, and in the new enactment the Commodities Clause remains *ipsissimis verbis* (Statutes at Large, vol. 36, p. 547).

There is of necessity a distinction between the organization of a coal company at the present time merely designed to evade the Commodities Clause and the continuance of a coal company which has been in lawful existence for many years. Neither such new company nor the old company could be attacked for lack of good faith on the ground that control through stock ownership is an evil, because the Court has squarely decided that such control is not one of the evils that Congress sought to prevent. The new company could be attacked only upon the ground that from its inception it constituted an evasion, the criticism being not against the stock ownership and control, but against the inception of the corporation as a device to conceal the real interest of the railroad. But in the case of the old company, no such evasion can be charged, the railroad never did own the coal, and has never had any interest, direct or indirect, in it.

In its decision, this Court made reference to the evasion which the Chesapeake and Ohio Railroad resorted to to avoid a statute of West Virginia. The evasion was carried out by having a sales agreement made in the name of an individual, the title remaining with the railroad. The Court said: "It may well be that the very object of the provision was to reach and render impossible the successful employment of methods of the character referred to" (p. 414). The equitable title remained in the railroad and the contract made in the name of an individual was held to be an evasion. In interpreting the Commodities Clause, this Court, with this in mind, said: "When the carrier at the time of transportation

has an interest, direct or indirect, in a legal or equitable sense in the article or commodity, the Commodities Clause applies." We interpret that construction to mean that if the relationship between the coal company and the defendant is such that the legal or equitable title is in the coal company and not in the defendant, then the Commodities Clause does not apply to prohibit the carriage. If on the contrary, the relationship between the defendant and the coal company is such as to place the legal or equitable title in the defendant, then the prohibition does apply. But the title never was in the defendant, and never could be placed in the defendant without the use of a deed of the coal lands or a bill of sale of the coal.

It cannot be successfully contended that the allegations set forth in, or admitted by the answer, show such a relationship between the railroad and the coal company that the Circuit Court was bound to ignore the corporate existence of the coal company and to hold that in a legal or equitable sense the interest in, or title to, the coal transported is in the railroad. The only possible basis for such contention would be proof that the coal company is not a legal entity, but merely a subterfuge, such that the Court must disregard its corporate existence in order to prevent a fraud, and therefore decide that the legal or equitable interest in the coal is actually in the railroad. That such a contention has already been held by this Court to be untenable seems apparent. The reference made by this Court to the far-reaching consequences of giving the clause the construction contended for by the Government, as indicated by the answers and returns, and to the questions of constitutional power which would arise if that construction were adopted, were predicated upon

an assumption that the coal company is a *bona fide* corporation. The reference was to the allegations set forth in defendant's answer to show the vast interests held by the coal company as an owner of coal lands and leases, an operator of coal mines, and a dealer in coal. The answer shows that the capital stock of The Lehigh Valley Coal Company owned by the defendant railroad was transferred to, and is now held by, the Girard Trust Company, as trustee under a General Consolidated Mortgage of the defendant, executed in 1903 as security for an issue of bonds, of which $23,539,000 in amount are outstanding in the hands of the public (Answer, par. 25; R. 14). The General Consolidated Mortgage contains covenants to the effect that the railroad will retain for itself the rights and powers of the holder of the greater part of the capital stock of the coal company. The stock of The Lehigh Valley Coal Company deposited under the General Consolidated Mortgage cannot be withdrawn from the lien of that mortgage and disposed of by the defendant during the life of the mortgage (R. 67 and 33). The relationship which the Government now seeks to have declared so lacking in good faith as to render the existence of the coal company a mere fiction, forms the basis of the very rights from which arose the grave and doubtful constitutional questions which this court found it unnecessary to decide. Upon the strength of the relationship existing between the defendant and the coal company millions of dollars have changed hands, pursuant to transactions whose good faith cannot be questioned.

FIFTH.

The decree of the Circuit Court should be affirmed.

J. F. SCHAPERKOTTER,
Respondent's Solicitor.

JOHN G. JOHNSON,
FRANK H. PLATT,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 920.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

ERIE RAILROAD COMPANY.

BRIEF FOR ERIE RAILROAD COMPANY.

Statement.

The above entitled case is one of the numerous cases known as the Commodities Cases, because they involve the constitutionality and the construction of the so-called Commodities Clause of the Interstate Commerce Act. This Court reversed the decree of the Circuit Court of Appeals in such cases holding the Commodities clause to be unconstitutional (164 Fed. 215), upon the ground, substantially, that the Commodities Clause should be

given a narrower construction than that contended for by counsel for the United States, and thus construed could be sustained, although then it would have no application to this defendant and many other defendants (213 U. S. 366).

In reversing and remanding, at the conclusion of the opinion of White, J., which was concurred in by every member of the Court except Harlan, J., it was said (213 U. S. 418):

> "As the court below held the statute wholly void for repugnancy to the Constitution, it follows from the views which we have expressed that the judgments and the decrees entered below must be reversed. As, however, it was conceded in the discussion at bar that in view of the public and private interests which were concerned, the United States did not seek to enforce the penalties of the statute, but commenced these proceedings with the object and purpose of settling the differences between it and the defendants, concerning the meaning of the commodities clause and the power of Congress to enact it as correctly interpreted, and upon this view the proceedings were heard below by submission upon the pleadings, we are of opinion that the ends of justice will be subserved, not by reversing and remanding with particular directions as to each of the defendants, but by reversing and remanding with directions for such further proceedings as may be necessary to apply and enforce the statute as we have interpreted it."

When the case came back to the United States Circuit Court of Appeals upon the basis of the decision of this Court, the mandate of this Court followed the opinion and remanded this case "to

the said Circuit Court for further proceedings in conformity with the opinion of this Court" (Record. p. 202).

Accordingly, in the Circuit Court the previous decree dismissing the bill was "set aside," and the cause was "reinstated upon the docket of this Court" (p. 203). Thereupon, upon the very same record, without offering to show any further facts orally, or withdrawing the stipulation of the United States to submit the case "on bill, answer, and the stipulation and agreement between counsel in said cause filed" (p. 197), or without any further assignments of error (pp. 198, 199), counsel for the United States moved that the decree to be entered be "that the bill be dismissed without prejudice" (Record, pp. 204-205).

The Court denied the motion that the decree be so entered, upon the ground that—

> "it appears to the court upon the pleadings that the defendant, Erie Railroad Company, is not transporting in interstate commerce from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any coal which has been mined, manufactured, or produced by it, and which it owns in whole or in part at the time of transportation, except such coal as is necessary and intended for its use in the conduct of its business as a common carrier, and in the opinion of the court is not violating the 'commodities clause' within the meaning of the clause as construed by the Supreme Court;
>
> "Now, therefore, it is ordered that said motion be denied." (Record, p. 204).

When the motion of the Attorney General for United States was denied, the decree shows that

instead of asking to withdraw the previous stipulation to submit on the pleadings, or to submit oral or documentary testimony in support of some allegation of the bill, the Attorney General stated that he intended to proceed no further in the cause. The decree was entered Mar. 7, 1910 and it is very explicit and clear as to what occurred. After reciting, briefly, the previous occurrences in the case, it proceeds (p. 205):

> "And whereas the Attorney-General of the United States has moved for the entry of a decree dismissing the bill without prejudice, and said motion has been opposed by the defendant and the court has denied the motion;
>
> "And whereas the Attorney-General has declared, his motion to dismiss without prejudice having been denied, that he intends to proceed no further in this court in this cause:
>
> "It is therefore on motion of counsel for the defendant ordered and decreed that the bill be, and the same is hereby, dismissed."

Assignments of Error.

The assignments of error in behalf of the United States are, in brief, as follows:

(1) That the Court erred in dismissing the complaint "without prejudice."

(2) That the Court erred in dismissing the complaint "absolutely."

(3) That "The bill of complaint herein did not state a cause of action within the construction placed upon the Commodities Clause by the Supreme Court, by reason of the omission of certain allegations of fact setting up the relations exist-

ing between the defendants and certain coal companies * * * and accordingly said Circuit Court erred in dismissing the bill of complaint absolutely'' (Record, pp. 207, 208, 209).

No opinion was written for obvious reasons, and we must, therefore, examine the record to see whether the assignments of error show the court below committed any error.

The Pleadings.

It will be seen that this appeal turns upon the pleadings in the case and the previous decision of this Court construing the Commodities Clause, because there are no additional facts in the record.

If the bill and answer are broad enough to fairly raise the issues that can be presented under the Commodities Clause, within the construction put upon it by this Court, then the Court below properly dismissed this case upon the merits in the absence of any motion to be allowed to cancel the stipulation previously made, and to be permitted to offer oral, or documentary, evidence in support of some allegation of the bill. If any ''omission'' in the bill had been pointed out, as none was, there would be more chance for the government to argue there was error below; but with the record reading, as we have shown it does, we see no error. Upon that point it will be helpful to the Court, perhaps, to bring before it the Commodities Clause and the construction put upon it by this Court, so that they shall stand in close juxtaposition, when they may be readily compared with each other. The Commodities Clause, as quoted in the bill and by this Court in its opinion, reads as follows (pp. 403-404):

> "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The construction put upon it by the opinion of White, J., is thus stated (213 U. S. 408):

> "Recurring to the text of the commodities clause, it is apparent that it disjunctively applies four generic prohibitions, that is, it forbids a railroad carrier from transporting in interstate commerce articles of commodities, 1, which it has manufactured, mined or produced; 2, which have been so mined, manufactured or produced under its authority; 3, which it owns in whole or in part, and, 4, in which it has an interest, direct or indirect."

Under this construction of the Commodities Clause, what facts was the United States at liberty to show under the bill of complaint, in the absence of an "agreement" and stipulation to hear the case on "bill and answer?" The bill of complaint appears (Record, pp. 1-5), and answers this question. The United States alleged, and, in the absence of a stipulation to submit the case on bill and answer, the United States could, therefore, at least try to prove the following facts:

Facts Alleged.

(1) That the Erie Railroad Company was a "corporation * * * under the laws of the State of New York * * * since long before" May 1, 1908; that it was "a railroad company * * * operating" an interstate railroad in Pennsylvania, New Jersey and New York, and other states; that it is "a common carrier, within the meaning" of the Commodities Clause of the Act of Congress; and that "through all the period aforesaid it was engaged in interstate transportation * * * of the article or commodity known as anthracite coal, from the mines in * * * Pennsylvania to the markets of other states."

Proof of these facts was and is unnecessary, because the answer does not deny one of these allegations. Instead, it admits them. It further goes into details as to the New York and Pennsylvania legislative history of the Erie Railroad Company and its predecessors, and of the property and rights to which it had succeeded. (Answer, paragraphs 1 to 7, pp. 6-18.)

The next allegations in the bill of complaint are, further, that the Erie Railroad Company is the

> "owner of the entire capital stock of the Hillside Coal and Iron Company, and of the Pennsylvania Coal Company, corporations of * * * Pennsylvania, and that it thus controls and has been controlling the election of the directors or managers of said Coal Companies"; that
>
> "said Coal Companies hold by conveyances and leases made long before" May 1, 1908, "anthracite coal lands and coal mines situated * * * in the State of

> Pennsylvania * * * continuously * * * operated, in the mining of anthracite coal, by and under the direct management of the respective officers of said Coal Companies, most of whom are, in the case of each of said Coal Companies * * * officers or directors of the defendant. That by virtue of the ownership of the entire capital stock of said Coal Companies by the defendant, * * * the defendant owns said coal lands and coal mines, and the anthracite coal therein, or thereupon, and mined and being mined therefrom, and has an interest therein; and that by virtue of the management of said Coal Companies by certain officers of the defendant * * * the operations of said Coal Companies in the mining of anthracite coal have been and are now being carried on by and under the authority of the defendant." (Paragraph 3, p. 2.)

Like allegations are made as to defendant being the "owner of some part of the capital stock of the Temple Iron Company, a corporation * * * of Pennsylvania." (Paragraph 4, p. 3.)

The answer sets forth the details as to the legislative history of the organization of the Pennsylvania Coal Company in 1838, and the Hillside Coal and Iron Company in 1869; that they—

> "mine, produce, and sell several million tons of such coal in said" (interstate) "market * * * it being over twenty-two per cent of its" (defendant's) "entire tonnage."

The government allegations further are that the coal so mined was transported in interstate commerce by defendant and "was not, and is not,

necessary and intended for the use of the defendant in the conduct of its business as a common carrier" (paragraph 5, p. 3).

But the answer further alleges that defendant also consumes of such coal annually in the "operation of its railroad * * * nearly 400,000 tons." (Answer, paragraphs 6, 7, 8, 9, pp. 11 to 14.)

The allegations of the bill further are as follows:

> "That, the defendant being the owner and part owner of the anthracite coal mined and being mined and transported and being transported, as aforesaid, and such coal having been and being mined by the defendant and under its authority, as aforesaid, and the defendant having an interest in said coal, as aforesaid, the transportation of said coal, as aforesaid, was, has been, and is unlawful, being a failure to comply with and a violation of the fifth paragraph of the first section of said 'Act to regulate commerce' as said section was amended by an act of the Congress of the United States, approved June 29, 1906, which prescribes:" (Here the Commodities Clause is quoted in the bill.)
>
> "That not only is said anthracite coal now being mined by and under the authority of the defendant and loaded on the cars of the defendant for transportation in interstate commerce, as hereinbefore set forth, but it will be so mined and loaded in the future; and that it is the purpose of the defendant to continue the same unlawful transportation of said coal, so to be mined and loaded upon the cars of the defendant, as aforesaid, as has been hereinbefore described, in violation of the law hereinbefore quoted." (Paragraphs 6 & 7, pp. 3 & 4.)

The allegation further is that defendant intends—

> "to continue to so unlawfully transport, as aforesaid, in violation of the law, * * * an article or commodity other than timber" &c * * * "mined or produced by it, or under its authority, and also * * * owned by it in whole or in part, and * * * likewise in which it has and will have an interest direct or indirect, and * * * not * * * necessary and intended for its use * * * as a common carrier." (Paragraph 8, p. 4.)

The last of the foregoing allegations quote the very words of the statute, and cover each and every of its conditions. They look to the future, and are broad enough to cover any necessary evidence to show defendant intended in future to violate the statute set out in words by actual quotation. The pleader clearly intended to, and did, cover any and all possible future violations of the statute by the defendant.

The relief prayed for, therefore, was—

> "an injunction to enjoin and prohibit the said Erie Railroad Company from further transporting anthracite coal * * * in violation of the law." (Paragraph 8, p. 4.)

The answer did not deny the ownership of "substantially all" of the stock of the Pennsylvania Coal Company and of the Hillside Coal & Iron Company, or that it was a "stockholder" of the Temple Iron Company, as alleged. But it did deny the allegations based upon inferences therefrom. It clearly put in issue the allegations as to (1) ownership of the coal in whole or in part; (2) any interest in the coal transported,

direct or indirect; (3) that the coal was mined or produced by it; (4) or that the coal was mined or produced by its authority. In this respect, the answer was directly responsive to the eighth paragraph of the bill of complaint. These responses of the answer are so important to show the counsel for the United States were squarely met on all issues of present or future intended violation as framed by them, under each and every part of the Commodities Clause, that we here quote these parts of the answer for the convenience of the Court.

> "10. This defendant denies that it owns the anthracite coal lands, or coal. of the Pennsylvania Coal Company, or the Hillside Coal & Iron Company, or the Temple Iron Company, or any other anthracite coal lands, directly or indirectly in whole or in part. It alleges that it has no interest therein direct or indirect, as it is advised by counsel learned in the law, although it admits and alleges that long before the commodity clause was enacted this defendant, or its said predecessors in interest, did lawfully acquire nearly all the capital stock of the Pennsylvania Coal Company and the Hillside Coal & Iron Company, and a small minority of the stock of the Temple Iron Company.
>
> "And this defendant admits and alleges that as a stockholder of the Pennsylvania Coal Company and of the Hillside Coal & Iron Company it has voted for directors of said corporations, as it lawfully might do; but this defendant denies that it has managed or is managing those corporations and alleges that its relations to and with them have not been other than as a stockholder thereof. On the contrary, it admits and alleges that they have been law-

fully managed, respectively, by their own directors and by their respective officers lawfully chosen by said directors. And this defendant denies that it has managed the Temple Iron Company or authorized it to do any business whatever, and alleges that its relations to and with said company have not been otherwise than as a stockholder thereof. It denies it has sold the coal of any of said corporations.

"This defendant admits and alleges that since May 1, 1908, it has been, is now, and for many years has been transporting the coal of said corporations to markets outside the State of Pennsylvania, many of which markets can only be reached over the railroad lines of this defendant; that such coal mines are most economically and naturally reached by lines of this defendant with which they have been so connected for many decades, and most of them are not reached by any other line of railroad, and other lines could not be constructed to reach many of them except at prohibitive cost.

"This defendant and its predecessors, long prior to the passage of said amendment of the interstate commerce act acquired substantially all the capital stock of said Pennsylvania Coal Company, Hillside Coal and Iron Company, Jefferson Railroad Company and Erie and Wyoming Railroad Company, and pledged the same under various of their mortgages, under and pursuant to which there have been issued and are now outstanding bonds for large sums aggregating many millions of dollars, which bonds are held by purchasers in good faith and for value throughout the world, in reliance upon the property mortgaged and pledged, including the railroad of this defendant and the said

stocks which form necessary and substantial portions of the security for said bonds. * * *

"11. This defendant denies that the operation, mining or producing of coal by any corporation, or company so called, has been, or now is carried on under the management or authority of this defendant; or that it has been or now is the owner, in whole or in part, of any coal transported by it as a part of interstate commerce; or that it has had, or now has any interest, direct or indirect, in any coal transported to interstate markets by it; or that it has violated, or failed to comply with the so-called commodity clause of the interstate commerce act; or that it is engaged in any unlawful transportation of coal; or that it intends hereafter to violate such clause by unlawfully transporting any coal to interstate markets. On the contrary, this defendant alleges that as a common carrier it is its duty to continue to transport such coal of the Pennsylvania Coal Company, the Hillside Coal and Iron Company, and the Temple Iron Company to citizens demanding it at interstate and other markets upon the same terms and conditions as those upon which this defendant transports other like coal to citizens of the United States and of the several States at such markets; and that interstate consumers of such coal, citizens of the United States and the several States, have the right to exercise liberty of contract and those constitutional rights and immunities of citizens of the United States and the several States, secured to them by various provisions of the Constitution of the United States and of the amendments thereto; and that they may buy and burn such coal as fuel as they choose to buy and burn instead of being

> forced through said commodity clause to buy and burn wood as fuel under the same circumstances and conditions. * * *"

The government could have shown any past, present, or intended future violations of the Act under its various allegations of (1) ownership; or that through coal companies it (2) mined or produced coal; or (3) had an interest in it, direct or indirect; or (4) had it mined or produced under its authority.

The answer quoted shows defendant so understood the statute, the bill setting out the statute in terms, and alleging its past and present violation, and its intended future violation in each way prohibited by the statute.

The answer finally is to the effect that defendant issued December 10, 1895, $80,342,000 bonds secured by a consolidated mortgage, February 1, 1901, $36,000,000 secured by the Pennsylvania collateral indenture, and April 1, 1903, $22,000,000 secured by a further general mortgage; copies of said mortgages being annexed as Exhibits "A," "B" and "C," and showing how tens of thousands of bondholders all over the world furnished the money to buy or improve the property involved. (Paragraph 12, pp. 15 and 16, and Exhibits "A," "B" and "C," pp. 18 to 198.)

The parts of the answer raising questions of constitutionality as to the Commodities Clause, if construed as it was claimed by the government it should be, were not disposed of by this Court in its previous decision, as those questions were avoided by the decision made. (Answer, paragraph 13, pp. 16-18, and 213 U. S. 366.)

The legislative record of the formation of the two principal coal companies as early as 1838 and 1869, the great publicity given all facts in the Coal Strike Arbitration in 1902 and 1903, the like publicity again given them by the Hearst cases in 1903, 1904 and 1905, and the publicity again given them when the government began its Sherman Anti-Trust case in May, 1907, certainly put the government counsel in a position to act advisedly in twice determining to stand on the bill and answer in this case. This determination was reached at the start when the cases were first argued, briefed, and submitted on that basis. It was again reached after the decision of this Court when such counsel determined to "proceed no further" after the Court had refused to dismiss "without prejudice." The practice, and common fairness to the Court below, required that counsel point out then and there what the "omission" was upon which a "without prejudice" decree was moved for by counsel, if the denial of such motion was to be relied upon here as reversable error. There is no error shown in this record.

ARGUMENT.

I.

The Court properly refused to dismiss this case "without prejudice."

The fight was in earnest. The government wanted to enforce the Commodities statute against the Coal Companies in which defendant had stock.

The decision made in this Court was that the statute did not apply to coal mined by the Pennsylvania Coal Company, the Hillside Coal & Iron Company, and The Temple Iron Company. That question was one of the questions necessarily and squarely raised by the pleadings, argument, and briefs. Not only the opinion of White, J., for the Court, but the single clear dissent of Harlan, J., shows this was the clear understanding of the whole Court, as it also was of all counsel in the case. Is the decree, then, any less one on the merits as to this point because it is upon bill and answer?

There can be but one answer to this question. It is the one long since made by the authorities. The answer becomes agreed and stipulated evidence upon each issue presented, and submitting upon bill and answer admits the truth of the answer as to every point wherein the bill and answer disagree.

The leading case so holding, that established the practice in this country, and that has been ever since followed by this Court, was decided by Chancellor Kent when at his judicial zenith, nearly a century ago. Nor was this a new question at that time in courts of equity, for Chancellor Kent then said:

> "The cause has been brought to a hearing by the plaintiffs upon the bill and answer, and, consequently, the answer is to be taken for true 'in all points.' This was one of Lord Bacon's rules (rule 64), and it was afterwards adopted by Lord Clarendon; and it is a rule admitted throughout the books to be well settled. (*Grosvenor* v. *Cartwright*, 2 *Ch. Cas.* 21. *Bohun's Cur. Canc.* 149.) All the averments in the an-

> swer are to be taken for true; and even where the defendant states that he believes and hopes to be able to prove such and such matters, they must be considered as proved, as the plaintiff, by not replying, has excluded the defendant from the opportunity of proving his averments. (*Barker* v. *Wyld*. 1 *Vern*. 140.)"
>
> Brinckerhoff *vs.* Brown, 7 Johns. Ch., 216, 222-223.

This rule has been often applied in this and other courts. From many cases so applying it, we select two or three quotations from cases where the Court was unanimous in its statement and application.

In Reynolds *vs.* Crawfordsville Bank, 112 U. S. 409, the Court said:

> "On setting the cause down for hearing on bill and answer the case is put at issue, the answer becomes evidence (Equity Rule 41, clause 2), and the only evidence the defendant needs, for it must be taken as true in all respects. *Brinckerhoff* v. *Brown*, 7 Johns. Ch. 217; *Grosvenor* v. *Cartwright*, 2 Ch. Cas. 21; *Barker* v. *Wyld*, 1 Vern. 140; *Perkins* v. *Nichols*, 11 Allen, 542; *Dale* v. *McEvers*, 2 Cow. 118. There is, therefore, no necessity for a replication or for the taking of testimony. The setting the case down for hearing on bill and answer is in effect a submission of the cause to the court by the complainant, on the contention that he is entitled to the decree prayed for in his bill upon the admissions and notwithstanding the denials of the answer."

In Banks *vs.* Manchester, 128 U. S., 250-251, the Court said:

> "The plaintiffs filed a formal demurrer to the answer; but, no such pleading being

> authorized by the rules in equity, the case was heard upon bill and answer, and a decree was entered dismissing the bill, from which decree the plaintiffs have appealed.
>
> "Rule 60 in equity authorizes the plaintiff, instead of filing a replication to an answer, to set the cause down for hearing upon bill and answer. In such case allegations of new matter in the answer are to be taken as true. 2 Daniell, Ch. Pr. (4th Am. ed.) 982, note 1; *Brinckerhoff* v. *Brown*, 7 Johns. Ch. 217, 223; *Perkins* v. *Nichols*, 11 Allen, 542, 544; *Leeds* v. *Marine Ins. Co.*, 2 Wheat. 380, 384."

In Sanford Fork & Tool Co., 160 U. S. 257, the Court said:

> "Fourth. A demurrer to the answer is unknown in equity practice. But the plaintiff may set down the case for hearing upon bill and answer; whereupon all the facts alleged in the bill and not denied in the answer, as well as all new facts alleged in the answer, are deemed admitted, as upon a demurrer to an answer in an action at law. Equity Rule 41, as amended at December Term, 1871, 13 Wall. XI; Equity Rule 60; *Leeds* v. *Marine Ins. Co.*, 2 Wheat. 380; *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405, 409; *Banks* v. *Manchester*, 128 U. S. 244, 250, 251."

Further citations are unnecessary, because the learned and experienced Attorney General and Special Counsel who served the government in this important case are presumed to have examined the law, and the Equity Rules of this Court, before stipulating to submit on bill and answer. The fact, too, that they would not so stipulate in the case of U. S. vs. Reading Co., is significant as showing they knew the result of hearings had would not be

a worthless decree "without prejudice," that would neither bind nor protect either party. They knew this Court would spend no time over the case, if confronted with a stipulation in advance that the decree should not be on the merits, but should only be "without prejudice."

A decree on the pleadings is binding on the merits, if not reversed. If reversed and remanded, as here, "for further proceedings," the Court below may only follow the decision of this Court in making its decree. When this case was remanded, therefore, "for further proceedings in conformity with the opinion," its *status* may be fairly and fully stated in the language of this Court in Sanford Fork & Tool Co., 160 U. S. 247. That was a case where this Court's previous opinions in 157 U. S. 312 on bill and answer showed defects in the bill, and the case was reversed and remanded "for further proceedings not inconsistent with the opinion of this Court." The Court below exercised its discretion upon facts shown and thereupon permitted an amendment to the bill. Upon appeal, this Court sustained such exercise of its discretion under the Rules 29 and 45, and said (pp. 255-256):

> "When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so

much as has been remanded. *Sibbald* v. *United States,* 12 Pet. 488, 492; *Texas* & *Pacific Railway* v *Anderson,* 149 U. S. 237. If the Circuit Court mistakes or misconconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court. *Perkins* v. *Fourniquet,* 14 How. 313, 330; *In re Washington & Georgetown Railroad,* 140 U. S. 91; City Bank v. Hunter, 152 U. S. 512; *City Bank, petitioner,* 153 U. S. 246. But the Circuit Court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. *Hinckley* v. *Morton,* 103 U. S. 764; *Mason* v. *Pewabic Co.,* 153 U. S. 361; *Nashua & Lowell Railroad* v. *Boston & Lowell Railroad,* 5 U. S. App. 97. The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate; and, either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly. *Sibbald* v. *United States,* 12 Pet. 488, 493; *West* v. *Brashear,* 14 Pet. 51; *Supervisors* v. *Kennicott,* 94 U. S. 498; Gaines v. Rugg, 148 U. S. 228, 238, 244."

After considering the practice and the courses open to plaintiff when defendant's answer was received, the "fourth" of which courses we have heretofore quoted as to submitting on bill and answer, the Court reviewed the facts of that case, and then said (p. 259):

"The case being thus left open, by the opinion and mandate of this court, and by

the general rules of practice in equity, for further proceedings, with a right in the plaintiffs to file a replication, putting the cause at issue, the Circuit Court might, in its discretion, allow amendments of the pleadings for the purpose of more fully or clearly presenting the facts at issue between the parties. *Marine Ins. Co.* v. *Hodgson,* 6 Cranch, 206, 218; *Neale* v. *Neales,* 9 Wall. 1; *Hardin* v. *Boyd,* 113 U. S. 756.

"The case is quite different, in this respect, from those in which the whole case, or all but a subsidiary question of accounting, had been brought to and decided by this court upon the appeal, as in the cases principally relied on by the petitioner, *Stewart* v. *Salamon,* 94 U. S. 434, and 97 U. S. 361; *Gaines* v. *Rugg,* 148 U. S. 228; *Ex Parte Dubuque & Pacific Railroad,* 1 Wall. 69; *In re Washington & Georgetown Railroad,* 140 U. S. 91.

"It must be remembered, however, that no question, once considered and decided by this court, can be reexamined at any subsequent stage of the same case. *Clark* v. *Kieth,* 106 U. S. 464; *Sibbald* v. *United States,* and *Texas & Pacific Railway* v. *Anderson,* cited at the beginning of this opinion."

What was the question "once considered and decided by this Court" in this very case, as to which it is to be "remembered" that such question will not be "re-examined in any subsequent stage of the same case"?

Can there be any doubt about this Court having considered and decided that holding "*substantially all*" the stock in these coal companies, in the very words of the answer, so as to control them according to the law of the state of their creation, did not make the coal itself that of this

defendant within any of the provisions of the statute.

To avoid passing upon the constitutional rights of defendant and its stockholders this Court was compelled to decide, and it did decide, as to the effect of owning "substantially all" the stock in such coal corporations and managing the same in accordance with Pennsylvania statutes. This Court, therefore, held:

> "If the words in question are to be taken as embracing only a legal or equitable interest in the commodities to which they refer they cannot be held to include commodities manufactured, mined, produced, or owned, etc., by a distinct corporation merely because of a stock ownership of the carrier. Pullman Palace Car Co. *v.* Missouri Pacific R. R., 115 U. S., 587; Conley *v.* Mathieson Alkali Works, 190 U. S., 406. And that this is well settled also in the law of Pennsylvania is not questioned. It is unnecessary to pursue the subject in more detail, since it is conceded in the argument for the Government that if the clause embraces only a legal interest in an article or commodity it cannot be held to include a prohibition against carrying a commodity simply because it had been manufactured, mined or produced, or is owned by a corporation in which the carrier is a stockholder."
>
> U. S. *v.* Delaware & Hudson Co., 213 U. S., 413-414.

With this plain ruling before them, what should counsel for the government have done? It is clear from the cases cited that the practice in cases like this one had long been well settled. They could stand upon their bill and literally let the

Court below take "further proceedings in conformity with the opinion," and this they did. What they did as we have seen, was to move for a decree "without prejudice", and failing to get that, they then said they intended "to proceed no further in this Court in this cause" (p. 205).

It was only then that the Court dismissed on the merits of the bill and answer, and upon the stipulation to submit upon them still of record. The Court below could do nothing less upon such a record. Upon that record its judgment is *res adjudicata,* as to that record, even against the United States.

> U. S. *vs.* Cal. & Ore. Land Co., 192 U. S., 355.

Fortunately for the government, however, it has not been, and will not be, improperly affected by that decree. In effect, it adjudicates that on the facts shown in the pleadings the defendant has not violated the Commodities Clause from May 1, 1908, when it became a law, until March 7, 1910, when the decree in equity dismissing the bill on the merits was entered; for being an equity decree it speaks from the date of its entry after the last hearing. And the rights of the government are carefully safe guarded in all subsequent suits or proceedings, because it was stipulated:

> "It is stipulated and agreed between counsel in the above cause that its submission on bill and answer and any averment or admission in the pleading of either party contained shall in no wise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted, and shall be operative and take effect only with

respect to the present suit and for the purposes thereof." (Record, p. 197.)

If there is any "omission" in the bill *of anything* needful to be legally alleged the government is not concluded upon that.

Gould *vs.* Ry., 91 U. S., 526.

The government being safeguarded, then, by virtue of the stipulation, and the law, as to all that has occurred since March 7, 1910, wherein is the government legally aggrieved by the decree entered? What is there here to show it should have been entered without prejudice as to the time between May 1, 1908, and March 7, 1910? There is nothing. This court intended to decide and did decide that there was no violation of the commodities clause upon the facts appearing and admitted; and such facts are still admitted, hence the decree entered is in strict "conformity with the "opinions of this court."

II.

The authorities do not sustain the claim of the government that the decree of the court below should have been entered "without prejudice."

The law and practice upon this subject is not new. It has long been well settled. The cases cited need no detailed examination or discussion. The law and practice can be quickly stated in the language of this Court by an able member of it not many years ago.

In Swan Land and Cattle Co. *vs.* Frank, 148 U. S., 603, 612, Jackson, J., stated the ground upon which dismissals without prejudice should be granted in these words:

> "In Durant *vs.* Essex Co., 7 Wall, 107, 113, "it is said that the general practice in this "country and in England, when a bill in "equity is dismissed without a consideration "of the merits, is for the Court to express "in its decree that the dismissal is without "prejudice, and that the omission of that "qualification in a proper case will be cor-"rected by this Court on appeal, in support "of which numerous authorities are cited. "In Kendig *vs.* Dean, 97 U. S., 423, 426, the "same practice was adopted."

The dismissals "without prejudice", then, are confined to those cases in which there is no decision that rests upon "a consideration of the merits." An examination of all the equity cases we can find that can be cited against us showing such dismissals "without prejudice" discloses that such dismissals were in cases where the Court had no jurisdiction to decide upon the merits because, (a) it lacked jurisdiction over the subject matter; (b) it lacked jurisdiction of necessary parties; (c) there was no case in equity, because there was an adequate remedy at law, or the suit was premature, or there was some other technical reason for dismissal which required that the suit be dismissed independent of any consideration of the merits.

This is not such a case. Both opinions in this court before show the decision rendered was squarely upon the merits of the commodities clause and the effect of a railroad company com-

mon carrier being "substantially" the only stockholder in a Pa. Coal Mining Co. and exercising its rights as such by voting as such stockholder so as to manage such coal company accordingly. Any other decision would have required a consideration upon the merits of the serious questions raised under the tenth amendment as to the reserved constitutional power of Pa. over her own coal mining corporations, and railroad corporations as stockholders thereof.

III.

The decree appealed from was right and should be affirmed.

Respectfully submitted.

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Office Supreme Court U. S.
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JAN 11 1911
JAMES H. McKENNEY,
Clerk.

Nos. 536, 537, 538, 539.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES OF AMERICA, APPELLANT,
v.
LEHIGH VALLEY RAILROAD COMPANY.

THE UNITED STATES OF AMERICA, APPELLANT,
v.
ERIE RAILROAD COMPANY.

THE UNITED STATES OF AMERICA, APPELLANT,
v.
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

THE UNITED STATES OF AMERICA, APPELLANT,
v.
THE PENNSYLVANIA RAILROAD COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

REPLY BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES OF AMERICA, appellant, *v.* LEHIGH VALLEY RAILWAY COMPANY.	No. 536.
THE UNITED STATES OF AMERICA, appellant, *v.* ERIE RAILROAD COMPANY.	No. 537.
THE UNITED STATES OF AMERICA, appellant, *v.* THE CENTRAL RAILROAD COMPANY OF New Jersey.	No. 538.
THE UNITED STATES OF AMERICA, appellant, *v.* THE PENNSYLVANIA RAILROAD COMPANY.	No. 539.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

REPLY BRIEF FOR THE UNITED STATES.

If the Government is unable to proceed further in these cases because of the absolute dismissal by the court below, the defendant railroads will be per-

mitted to continue a plain violation of the commodities clause as construed by this court.

On the former hearing, which resulted in the decision reported in 213 U. S., 364, this court construed the commodities clause to prohibit the transportation of commodities in interstate commerce after May 1, 1908, under either of the three following circumstances:

First. When the commodity has been manufactured, mined, or produced by the carrier *or under its authority*, and at the time of transportation the carrier had not, in good faith, dissociated itself from such commodity.

Second. When the carrier owns the commodity transported in whole or in part.

Third. When the carrier, at the time of transportation, has an interest in the commodity, direct or indirect, but not including an interest represented only by the ownership of stock in a "*separate*," "*distinct*," *and* "*bona fide*" *corporation.*

The Government is now attempting to "apply and enforce the statute" as thus interpreted and as this court in the opinion on the first appeal directed the Circuit Court to do. Counsel for the United States asked the court below: First, to permit amendments of the bills of complaint in order to show that in several instances the pretended coal companies in which the railroads own all the stock were not separate, distinct, or bona fide corporations, but were mere coal departments of the railroads and used for the sole purpose of concealing the railroads' ownership of the

coal transported; and, second, to dismiss the bills without prejudice in order that new actions might be brought setting up these facts. We submit that the court below erred in refusing to allow such amendments and further in refusing to dismiss without prejudice.

I.

The facts now sought to be presented under the commodities clause are not the same as those which were before this court on the former appeal.

It is apparent from the opinion of the court below in the present case (Rec., in No. 536, at p. 148) that the Circuit Court misinterpreted and misapplied the opinion of this court on the former appeal. The court below says:

> As we read the opinion the Supreme Court has decided on the facts set forth in the bills and answers of the several cases before it that the holding by one of the defendant companies of the entire stock of a bona fide corporation, and the control thereby resulting to it from its power, and the exercise thereof, to appoint its officers and manage its business, does not give such railroad company any interest, direct or indirect, in the coal which may be mined by such corporation and transported in interstate commerce over the lines of such railroad companies within the meaning of these words as contained in the act under review.

This statement is all that will be found in the opinion of the court below as the ground upon which it based its refusal to allow amendments of the

Government's bills or to dismiss the cases without prejudice.

The error of the Circuit Court is thus manifest. It proceeds upon assumptions not justified by this court's opinion. It points out first that this court decided the former case "on the facts set forth in the bills and answers of the several cases before it" and then assumes that this constitutes a decision on *facts not set forth and not before this court.* The very purpose of the proposed amendment and of the motion of the Government to dismiss without prejudice was in order to plead facts not before this court and not passed upon on the previous hearing of these cases. Next, the Circuit Court assumes that the alleged coal companies owned and operated by the railroads, and particularly the Lehigh Valley Coal Company are bona fide corporations, *while this is the very question in the present case.* Finally, the Circuit Court assumes that this court decided on the former appeal that where coal has been mined under the management and authority of the railroad, without respect to ownership, and that authority and management have not been withdrawn at the time of transportation, the coal may nevertheless be lawfully shipped by the carrier in interstate commerce. *It was precisely the contrary which this court held.*

The whole question in the present case turns upon the difference between the facts alleged in the pleadings on the previous appeal and those which the Government now offers to prove. This difference is clear and fundamental.

In the first case the Government rested its contention solely on the fact of stock ownership. It insisted that if a railroad company owned all the shares, or a single share, of the stock of a coal company it could not lawfully transport the coal of that company in interstate commerce. It insisted that this stock ownership constituted an interest, direct or indirect, within the meaning of the commodities clause. The Government now makes no such contention. It assumes, under the court's decision, that if a railroad company owns all the stock of a coal company and by virtue of its ownership of the stock elects all the officers of the coal company, and, by virtue of its power to elect such officers, chooses its own officers as the officers of the coal company it may, nevertheless, lawfully transport the coal of such company in interstate commerce. *But it insists that there must be a bona fide coal company, separate and distinct from the railroad company,* within the meaning of this court not only in the former commodities decision but in numerous cases in which this court has found that although an independent corporate entity was pretended it did not in fact or in law exist. It insists that while a railroad may transport in interstate commerce the products or the property of another company in which it owns all the stock and elects all the officers, the subsidiary company must be one which manages its own affairs, which exists for the purpose of conducting an independent business and which is not a mere device for the purpose of concealing the real owner of its commodities. It insists

that a coal company is not a bona fide, separate, and distinct corporation, from the railroad company which owns its stock when the facts show that the coal company is in the railroad business and not in the coal business, and is being conducted not for the purpose of producing, buying, or selling coal at a profit, or with any expectation or possibility of a profit, but for the sole purpose of producing freight for the railroad and destroying the business of other coal companies unless they ship over the lines of the railroad and agree to its terms. It insists, finally, that, *apart from any question as to who owns its stock*, a corporation is not bona fide if its corporate functions are performed, its business directly managed, its contracts made, and the price of its product fixed not by its own officers but by the officers of another corporation. In other words, if a railroad company did not own a single share of the stock of a coal company and yet directed all the business of the coal company, not through officers of the coal company but through officers of the railroad, *acting as officers of the railroad*, and controlled the product of the coal company, determining how much it should mine, where, when, to whom and for what price it should sell, such coal company would not be a bona fide corporation and the railroad could not lawfully transport its commodities in interstate commerce. Indeed, Congress seems to have had just such a situation in mind when it enacted, as part of the commodities clause, that even if a railroad did not

own the commodity transported, in whole or in part, and had no interest in it, direct or indirect, nevertheless it could not transport such commodity if it was mined, produced, or manufactured *under the authority* of the railroad and that authority continued during the transportation. Surely if a railroad may not lawfully transport commodities owned by a corporation which the railroad company manages, directs, and controls, even though it has no stock whatever in such company, a railroad can not acquire the right to transport such commodities by purchasing all the stock of the company which owns them. Yet this is the very claim made by counsel for the railroads in the present case. They say that since the law sanctions the transportation by a railroad of commodities belonging to another corporation in which the railroad owns all the stock, therefore whenever a railroad owns all the stock of another corporation it may lawfully transport the commodities of the latter. We say that while a railroad may lawfully transport the commodities of another company in which it owns all the stock, it may not do so unless the other company is a bona fide corporation, and it may not do so if the railroad directly manages the business of the other company, making it a mere department of the railroad, even though it owns all the stock of the other company.

We believe this court used advisedly the words "bona fide, separate and distinct" in referring to producing companies whose commodities a railroad might lawfully transport, although it had a stock

interest therein. We do not believe these words are without meaning. What is a "bona fide, separate and distinct" corporation? Is it not something more than a corporation in name? Is a coal company which has no independent corporate life or activity, which exists for the sole purpose of enabling a railroad to control the production and price of coal and which is managed by the railroad as a mere branch of its business, a "bona fide, separate and distinct" corporation? If it is, then how can one define a corporation which is not bona fide, separate or distinct?

It was in view of this construction of the commodities clause that the Government proposed, in the court below, to amend its several bills of complaint and to set up facts, which it had ascertained could be shown by ample evidence, that in one or more instances, at least, the defendant carriers not only own all the stock and appoint all the officers of coal companies whose commodities they are transporting, but are using these companies as a mere subterfuge to conceal their own direct control of the commodities and are conducting the coal companies not as separate corporations, but as mere coal departments of the railroads.

In the oral argument of the present cases counsel for the railroads asserted that the only difference between the Government's original bill of complaint and its proposed amended bill against the Lehigh Valley Company was that the latter contained more "epithets." The issues in this litigation can not be

avoided or confused by a flippant remark. An examination of the original and amended bills shows that they proceed upon absolutely distinct theories, and the facts respectively pleaded make out totally different relations between the railroad company and the coal company. They are alike in one particular only, and that is that in both bills the Government alleges that the railroad owns all the stock of the coal company and that the officers are substantially the same.

From this point the original and amended bills proceed on wholly different lines.

The original bill alleges that the coal company is being managed by the officers of the coal company. The amended bill alleges that the coal company is being managed by the officers of the railroad company acting as such.

The original bill alleges that "by virtue of the ownership of the entire capital stock" of the coal company the railroad owns the coal lands and the coal and has an interest therein. The amended bill alleges that the railroad directly owns the coal lands and the coal and that the coal company is a mere device to conceal such ownership.

The original bill alleges that the "mining" of the coal is being carried on under the authority of the railroad. The amended bill alleges that the railroad has not dissociated itself from this authority at the time of transportation and that the railroad controls the commodity from the time it is produced until it is sold in the market.

The original bill makes no charge whatever that the railroad manages and directs the business of the coal company except as such management and direction follow from its ownership of the latter's stock and its election of the latter's officers. The amended bill charges that the railroad, independently of stock ownership, manages and directs, through its own officers, all the business of the alleged coal company.

The original bill contains no averment that the railroad makes the coal company's contracts, determines from whom it shall buy, to whom it shall sell, and what price it shall receive for its product. *The amended bill avers that the railroad does all these things, not through the officers of the coal company acting as such, but through the officers of the railroad acting as such.*

In addition to these averments the amended bill alleges that the coal company is wholly financed by the railroad; that the former pays no interest on the railroad's funds used in its business; that the railroad guarantees the bonds of the coal company and pays the interest on such bonds; that the coal company pays no dividends on its stock and is not operated with the purpose or possibility of earning any dividends.

From these facts it is alleged in the amended bill that the coal company is not a bona fide, separate, or distinct corporation, but is a mere department of the railroad and is being used as a device by means of which the commodities clause is violated. It is apparent, therefore, that the allegations in the

amended bill are neither "epithets" nor mere conclusions of the pleader. They are averments of facts, which, if supported by the evidence, present an entirely different situation from that before the court on the former hearing of these cases and bring the railroad in the transportation of this coal clearly within the inhibitions of the statute as construed by this court.

In the recent Reading case, to which reference is made at pages 30 and 31 of the Government's main brief in No. 536, Judge Buffington examined the relations between the Lehigh Valley Railway Co. and the so-called Lehigh Valley Coal Co., and expressly found that the coal company is but an *alter ego* of the railroad itself. If there is any possible case in which a railroad can be forbidden, under the commodities clause, to transport the products of another corporation which is not bona fide, separate, or distinct, and which exists with the sole effect of accomplishing by indirection what the railroad can not directly do, this amended bill presents such a case. If such a situation does not constitute a violation of the commodities clause, then that statute is incapable of enforcement as construed by this court. While it is true that Congress may amend the act and forbid a railroad to transport coal owned by a corporation in which the railroad has a stock interest, this court, in its opinion in the original case, found that the statute, *as it stands*, is capable of effective enforcement and directed the court below to apply and enforce it. But if the statute, *as it stands*, has no application to

a case in which the railroad is transporting its own products by a method which, if conceived after the decision of this court, would constitute a mere fraud upon the law, the statute accomplishes nothing and might as well never have been enacted.

II.

It can make no difference in this case that the coal company was organized before the passage of the commodities clause and before the decision of this court, for it is the effect of the relation between the railroad and the coal company and not the motive of it which constitutes a violation of the statute.

In the oral argument and in the brief of counsel for the Lehigh Valley Railroad, in the present cases, the suggestion has been made that since the coal company here was organized before the passage of the commodities clause and before the decision of this court construing it, the railroad can not be charged with using the subsidiary company as a mere device to conceal its ownership of the coal transported. In the brief for the Lehigh Valley Railroad, at pages 20 to 25, inclusive, it is admitted that if a coal company is organized *after the decision of this court in the commodities cases*, not as a bona fide, separate, and distinct corporation, but as a mere shell to hide the railroad's ownership of the coal transported, such circumstances would bring the railroad within the decision. But it is contended that if the coal company was organized *before this court's decision*, the railroad might lawfully transport the products of such company, even though the latter

was not a bona fide, separate, or distinct corporation.

Counsel for the Lehigh Valley Co., at page 23 of their brief, say:

> The *bona fides* in the opinion of this court is of course the good faith of the coal company's managers with reference to the commodities clause; that is to say, whether the coal company is such a cloak or shell or device to avoid the commodities clause, that the court must disregard its corporate existence in order to prevent a fraud upon the Government, and thereupon decide that the legal or equitable interest in the coal is actually in the railroad company.

In other words, if the motive of a railroad in the organization of a coal company, *after the commodities decision*, is to practice a "fraud upon the Government," the court may disregard the corporate existence of the coal company so as to prevent the fraud; but if the effect of the maintenance of a coal company, organized *before the commodities decision*, is to practice a fraud upon the Government, nothing can be done to prevent it. Such reasoning discloses a complete misconception of the meaning and effect of the statute. By the same token it could have been argued that when the commodities clause was passed, making it unlawful, after a particular date, to transport commodities under the circumstances forbidden, the statute could not apply to a case where the railroad owned the commodity before the law went into effect, but could apply only to

commodities thereafter acquired by the railroad. *The very intent of the statute was to make unlawful that which was lawful before.*

Again, at page 23 of the brief of counsel for the Lehigh Valley Co., it is said that the relationship between the railroad and the coal company "arose and continued many years before the commodities clause was passed"; that this relationship was authorized by the laws of Pennsylvania, and that "the organization and conduct of the coal company was the natural consequence of that state of the law."

Then counsel for the railroad proceed as follows:

> It was lawful and *bona fide*. It can not be disputed that that condition continued at least until the commodities clause became the law. The relationship between the companies did not change, only the law changed; and if the subsequent relationship was one of bad faith it was rendered so by the law, and not by any act, purpose, or intent of the coal company or its officers, which is an absurdity.

Here is the gist of the whole matter. The contention is ingenuously made that the relationship between the railroad company and the coal company which was lawful before the passage of an act of Congress could not become unlawful after the enactment. "The relationship between the companies did not change," says counsel for the railroad, "*only the law changed.*" But if the law changed, and the relationship between the railroad and the coal company was made unlawful by the statute, it

could not continue to be lawful simply because it was originally conceived in good faith and without any intent to violate a statute not yet in existence.

It must be apparent, therefore, that the good faith which characterized the original organization of a coal company, *before the commodities decision*, as a mere "cloak or shell," as counsel say, and not as an independent corporation, can not be used as a shield to defend the continued existence of such "cloak or shell," *after the commodities decision*.

To hold that coal companies organized *before the commodities decision* and continued in existence after that decision, as mere "cloaks or shells" to conceal the railroad's ownership of the coal transported, are *outside* the operation of the statute; and that coal companies organized *after the commodities decision* and maintained as such "cloaks or shells" for the same purpose or with the same effect are *within* the operation of the statute, is to produce a discrimination between railroads in the enforcement of the law which is as unnecessary as it is indefensible.

Let us take two railroads involved in the present suits. The Delaware, Lackawanna & Western is enjoined from transporting in interstate commerce the coal which it directly owns. According to the counsel for the Lehigh Valley Co., if the Lackawanna should now organize a coal company as a "mere shell or cloak" to conceal its ownership of the coal it would violate the commodities clause, but the Lehigh Valley may maintain the same kind of a coal company with the same effect without violating the law.

III.

The courts have uniformly held that the fiction of a separate corporate entity will be disregarded whenever it is insisted on as a protection to an illegal transaction.

In the main brief for the Government we cite many cases to the effect that where a corporation is so organized and controlled and its affairs are so conducted as to make it merely an instrumentality or adjunct of another corporation the legal fiction of its separate entity will be repudiated, and the corporation which manages and controls it will be treated as the only one in existence.

This is the rule laid down by this court in *Miller & Lux* v. *East Side Canal & Irrigation Co.* (211 U. S., 293), where a corporation had been organized for the sole purpose of invoking the jurisdiction of the Federal court, and where the decree in its favor would have been under the control and for the benefit of another corporation.

To the same effect is *Lehigh Mining & Mfg. Co.* v. *Kelley* (160 U. S., 327), where this court, speaking through Mr. Justice Harlan, declared that the organization of a corporation in one State by the stockholders and officers of a corporation in another State, and the transfer of land from the latter to the former for the purpose of giving jurisdiction to the United States court of an action to recover the land on the ground of diverse citizenship of the parties, was a collusive arrangement and a fraud upon the court.

It is true that in these cases the pretended corporation was organized for the purpose of practicing a fraud, while in the case at bar the Lehigh Valley Coal Co. was organized before the enactment of the commodities clause or the construction of it by this court, and therefore not for the purpose of circumventing that statute. But the point we make is that this court has disregarded the fiction of a separate corporation where it was used as a means to accomplish that which otherwise could not lawfully be done, and that with respect to corporations which are in existence with the sole effect of defeating the enforcement of the commodities clause, as construed by this court, it can make no difference whether they were originally organized in good faith or in bad.

Where the effect of recognizing as a separate entity a corporation which is not in reality an independent enterprise, without regard to the motive of its organization, is to sanction a wrong or permit the circumvention of law or public policy, the courts will refuse such recognition.

In the *Watertown Paper Co. case* (169 Fed., 252), Judge Noyes, of the Circuit Court of Appeals, declares that the legal fiction of distinct corporate existence will be disregarded not only when necessary to prevent fraud, but in any case where a corporation is so controlled and its affairs are so conducted as to make it merely an agent or adjunct of another corporation.

In *Interstate Telegraph Co.* v. *Baltimore & Ohio R. R. Co.* (51 Fed., 49) it appeared that the telegraph

company was a mere department of the railroad company and the railroad company was required to pay the telegraph company's debts out of its own funds. There may be cited also Morawetz on Corporations, sections 1 and 227; *Gas Co.* v. *West* (50 Iowa, 16); *Booth* v. *Bunce* (33 N. Y., 139); *Bennet* v. *Minott* (28 Oreg., 339).

Other cases to the same purport are noted in the main brief of the Government.

IV.

Without respect to ownership either of the stock of the coal company or of the coal itself a railroad can not lawfully transport in interstate commerce coal which is produced under its authority and from which it has not been dissociated before the act of transportation.

In the opinion of this court on the former hearing of the commodities cases (213 U. S.) it is said, at page 408, that the statute in question "disjunctively applies four generic prohibitions." The court then sets out these prohibitions against the transportation of commodities in interstate commerce by railroads, as follows:

1. Which it has manufactured, mined, or produced;

2. Which has been so mined, manufactured, or produced under its authority;

3. Which it owns in whole or in part; and

4. In which it has an interest, direct or indirect.

It thus appears that in considering the meaning of the act the court set out as one of the things expressly

forbidden the transportation of commodities produced *under the authority* of the railroad transporting them. Coming finally to construe the act, the court reduces these four propositions to three (p. 416), and states as the first of these three propositions that a railroad company is forbidden to transport in interstate commerce commodities which have been manufactured, mined, or produced by the carrier "or *under its authority*, and at the time of transportation the carrier has not, in good faith, before the act of transportation, dissociated itself from such article or commodity."

If we apply this proposition to the facts set forth in the proposed amended bill for the Government in the Lehigh Valley case, it is obvious that the railroad company is now violating the commodities clause as construed by this court. Independently of any ownership of stock, it is charged by the Government, and admitted for the purposes of this case, that the coal transported, although ostensibly owned by the alleged coal company, is mined and produced under the direct authority of the officers of the railroad company; that the railroad company makes all the contracts with respect to the coal, continues its absolute control over the commodity until it reaches the market, and fixes the price at which it shall be sold at the Atlantic seaboard. It follows that if any meaning is to be given to the words "produced under its authority" and from which the carrier "has not in good faith before the act of transportation dissociated itself," they must apply to the present case.

The words "produced under its authority" must mean something different from the words "owned in whole or in part." They must mean something different from the words "an interest, direct or indirect," for the court says that these prohibitions are put in the "disjunctive," and "disjunctive" means "separate or disjoining," and therefore not mutually inclusive, according to Webster. "In logic," the dictionaries say, "a disjunctive proposition is one in which the parts are opposite to each other, as, it is either day or night." Therefore commodities produced "under the authority" of a railroad company may be commodities which the railroad does not own in a legal or equitable sense, and commodities in which the railroad company may have no interest, direct or indirect, in such legal or equitable sense.

It follows that if the railroad company in the present case owned not a single share of the stock of the coal company and had no title, either legal or equitable, to the coal, it could not lawfully transport it in interstate commerce if the same had been produced "under its authority" and the railroad had not, in good faith, dissociated itself from such commodity. Whatever may be said as to who owns the coal in the present instance, the Government's amended bill certainly shows that this coal was produced under the direct authority of the railroad and of no one else, for it is charged that the officers of the railroad, acting as officers of the railroad, direct and control the production of the coal. Has the railroad dissociated itself from such authority? The amended bill avers

that the railroad fixes the price at which the coal is sold in the market after its transportation. But the court says the railroad must, *in good faith*, dissociate itself from the commodity transported. It is not even suggested that the railroad has done this. For the purpose of the present appeal it is admitted by the railroad, as averred in the Government's amended bill, that the railroad controls, directs, and supervises "the mining and production of such coal, the shipment and transportation of the same over the defendant's railroad, and the sale thereof at the seaboard." If this does not come within the first proposition of this court in its construction of the commodities clause then it is difficult to see to what possible circumstances that proposition would apply.

V.

The briefs for the Government on the former hearing of these cases do not make any contention with respect to facts now averred in the proposed amended bill and now for the first time requiring the consideration of the court.

Since the oral argument we have examined with care the three briefs filed by the Government in the commodities cases during the October term in 1908, and are unable to find at any place in any of said briefs the contention that on the facts then before the court the Government was entitled to the relief asked on the ground that the subsidiary coal companies, or any of them, were not bona fide, separate, and distinct corporations, but were mere pretended companies used for concealing the railroads' owner-

ship of the coal. The whole theory of the Government's case was that stock ownership alone constituted an interest, direct or indirect, which forbade the transportation by the stockholding railroad of the coal owned by the subsidiary company.

The first of these briefs for the Government contains 137 pages. The only suggestion in it of the relation between a railroad and a coal company, such as is now alleged, is at page 25, where it is said that the object of the commodities clause was "to divorce transportation from production on the part of the railroads, etc." Again, at page 47, it is said that the railroads own the coal properties through their ownership of the stock of the coal companies. Again, at page 115, it is said that the purpose of the statute was to prevent discrimination on the part of interstate railroads against the shippers of the country and in the interest of themselves, or of corporations under their control. But this was merely an argument to the effect that the words in the statute "any interest, direct or indirect," included stock ownership.

The second and supplemental brief for the Government in the former cases contains 45 pages, and is devoted to three propositions: First, that the property of the carriers is not taken contrary to the Constitution; second, that the carriers can acquire no right from the States to be free from the control of Congress over interstate commerce; and third, that they were not protected by the policy or laws of Pennsylvania.

The third brief for the Government, called "Memorandum for the United States on the New Haven case, etc.," contains 12 pages. During the oral argument it was suggested that at page 10 of the last-named brief counsel for the Government in the former cases presented the identical argument made in the present cases, to the effect that railroads could evade the law by the organization of pretended coal companies which would be mere departments of the railroads. The Government was there discussing the New Haven case, and the statement was made in that connection that a railroad might "evade the prohibitions of the law by placing its commodities and lands, and industrial establishments producing them, in the nominal ownership of some corporation under its absolute control," etc.

This is the nearest approach in any of the briefs of the Government in the former case to the situation now presented to the court. But even here it is apparent that the Government was not arguing the case now presented, for the following reasons:

First. Because the Government was contending in the former case that stock ownership in a coal company alone was such an interest as forbade the railroad owning the stock to transport the coal; and

Second. Because there were no facts averred in any of the Government's bills on the former hearing which could have justified the argument that the railroads were evading the law by the maintenance of coal companies which were not, in good faith, separate and distinct corporations.

The most that can be inferred from this extract from one of the Government's briefs in the former case is that counsel for the United States apprehended that if this court should so construe the commodities clause as to make lawful the transportation of coal belonging to a company in which the transporting railroad owns stock, the railroads might take advantage of such a construction by the organization of coal companies which would not be bona fide separate and distinct corporations, but mere coal departments for the carriers. But this court very naturally disregarded such an apprehension, since there were no facts pleaded to justify it. It seems clear, however, that the court had such a contingency in mind when it took the precaution to declare, in the opinion in the former cases, that while a railroad might lawfully, under the commodities clause, transport the articles produced or owned by a company in which it held stock, that company must be a *bona fide separate and distinct corporation*. That this was the view of the court seems clear also from that portion of the opinion in which there is discussed the purpose of Congress in postponing until May 1, 1908, the effective operation of the statute. The court says that the delay thus accorded is entirely consistent with the assumption that it was granted to afford sufficient time for the railroads to provide for the "*segregation, by means of the organization of bona fide manufacturing and mining or producing corporations*" of the coal business formerly conducted by the railroads. In

other words, it was held that Congress may have intended to permit the organization of coal companies by the railroads which had theretofore owned the product directly, but the court was careful to say that this meant a "segregation" of the coal business from the railroad business and the organization not merely of corporations to carry on the coal business, but of *bona fide corporations* for that purpose.

In the Lehigh Valley case there is no "segregation" of the coal business from the railroad business. There is not even an amalgamation of the two. The coal company is a mere branch of the railroad, managed by the railroad in the same way as if instead of a corporation there were a "superintendent of the coal department." We submit that this is not a bona fide separate and distinct corporation within the meaning of this court's opinion.

VI.

The briefs of counsel for the railroads in the former case show that no issue was involved with respect to the bona fide character of the subsidiary coal companies.

We have also examined briefs of counsel for the railroads in the former cases, and aside from the contention that the commodities clause is unconstitutional the argument was confined almost exclusively to the proposition that the words "any interest, direct or indirect," do not include a case in which a railroad holds stock in a coal company. The bona fides of such coal company or of its organization is

not discussed at all. It was assumed on the former hearing (and the facts set forth in the Government's bills justified no other assumption) that the coal companies were bona fide separate and distinct corporations.

The one instance in which counsel for the railroads in the former briefs approaches the question now before the court is at page 32, where it is said that the words "direct or indirect interest" were doubtless put into the statute for the purpose of preventing an evasion of the act by the substitution of some other "person" as the legal owner of the coal while the railroad retained the beneficial interest. That suggestion fits the present situation with an accuracy which was doubtless unintended. If we substitute "corporation" for "person," the relationship is identical, for the coal company in the case at bar is not a separate entity having any interest of its own in the coal, but a mere trustee for the railroad.

VII.

The court below erred in not allowing the Government to amend its bill of complaint.

The closing paragraph of the opinion of this court and the mandate of the court on the former appeal of the commodities cases show unmistakably that further proceedings were contemplated in the court below and further facts were expected to be averred and proven, if necessary, in order to "apply and enforce the statute" as this court had construed it. The sole result of the former adjudication was a find-

ing that the act was constitutional and that it applied in the several specific circumstances stated by the court. There was no attempt by this court to ascertain what the facts were in each case, nor whether all or any of the railroads were obeying or disobeying the statute. The suits were brought, as counsel for the Government and the carriers had agreed, and as the court understood, for the "purpose of settling the differences between it [the Government] and the defendants *concerning the meaning of the commodities clause and the power of Congress to enact it as correctly interpreted.*"

The express stipulation between opposing counsel, as set out in the Government's main brief in the present cases, shows that the suits were brought for this specific purpose, which was conceded at the bar on the former argument, and it was not understood either by counsel or the court that the decision as to the constitutionality and meaning of the act should be conclusive upon any other issues, or should preclude the pleading of further facts by either party in order to finally determine in what particular, if at all, any of the roads were violating the statute.

Under these circumstances we submit that there was no discretion in the court below to disallow the Government's motion to amend the bill of complaint against the Lehigh Valley Railroad. It was the duty of the Circuit Court, under the opinion and mandate of this court, to allow such amendment.

The general rule in such cases is stated in 3 Encyclopedia of Law and Practice, at page 579, as follows:

> Where a cause is reversed and remanded with directions to proceed in conformity with the views expressed in the opinion filed, and it appears from such opinion that the grounds of reversal are of a character which may be obviated by subsequent amendments of pleadings or the introduction of additional evidence it is the duty of the trial court to permit the cause to be redocketed and permit amendments to be made and evidence introduced on the hearing, just as though it was then being heard for the first time.

Citing numerous cases.

VIII.

The twenty-ninth equity rule invoked by counsel for the railroads does not apply in this case.

The twenty-ninth equity rule applies only where leave to amend is asked before a demurrer or plea is allowed. (*National Bank* v. *Carpenter*, 101 U. S., 567, 568.) In that case, referring to the twenty-ninth rule of equity practice, this court, by Mr. Justice Swain, said:

> That rule has no application, and does not affect the case. It applies only where leave is asked before a demurrer is allowed; formerly upon the allowance of a demurrer to a whole

> bill, the bill was out of court, and no subsequent proceeding could be taken in the cause. (*Citing.*) "The rigor of this principle was subsequently relaxed. It is unnecessary to pursue the subject further, because the practice in such a state of things in the courts of the United States is regulated by the thirty-fifth rule of equity practice, which is as follows: 'If upon the hearing any demurrer or plea shall be allowed, the defendant shall be entitled to his costs, but the court may in its discretion upon motion of the plaintiff allow him to amend his bill upon such terms as it shall deem reasonable.'"
>
> See also 1 Foster Fed. Practice, 3d ed., sec. 161, p. 574.

It is clear that after the reversal of the case at bar by this court on the prior appeal, and after the remanding to the lower court, the case was in the same situation as if a demurrer or plea had been allowed. In the original bill the Government had set up merely the ownership of stock in the coal company as a cause of action. This court by its decision held that stock ownership does not give the railroad carrier an interest in the coal of the coal company. The effect of the decision, therefore, was to hold that the complaint of the Government did not state a cause of action. Accordingly an amendment was appropriate under the thirty-fifth rule quoted above.

IX.

In any event the Government was entitled to a dismissal of the cases without prejudice.

Even if the matter of an amendment was within the discretion of the circuit court the Government was at least entitled to a dismissal without prejudice. In our main brief there are numerous cases cited to sustain this contention and none can be suggested to the contrary. It would work a grave injustice to the United States to hold that the former adjudication of these cases, which was expressly limited to the question of the meaning and validity of the commodities clause, is conclusive against the Government and bars the bringing of any action against these defendant carriers for a violation of the act by the transportation of coal under circumstances which the Government believes it can show are within the inhibitions of the law as construed by this court.

We submit that the amended bill of complaint, proposed to be filed in the Lehigh Valley case makes a good cause of action within this court's construction of the act. But even if that bill is insufficient and other facts not there averred are necessary, the Government ought to have the opportunity to make further amendments or set up other facts, susceptible of proof, which will show that in one or more instances, at least, these defendants are now disregarding the commodities clause as interpreted by this court.

The railroads assert that they are entitled to an end of the litigation. But they will suffer no

hardship if the actions are dismissed without prejudice. Their security must abide in the assurance that they are obeying the law and that the Government will be unable to show the contrary. On the other hand, if the decrees below dismissing absolutely the several bills of complaint are affirmed, the Government is without a remedy to proceed further, even though it may be ready and able to show that one or more of the railroads are violating the commodities clause in the transportation of the very coal involved in the former litigation.

In our main brief we cite a number of cases in support of the Government's right to a dismissal without prejudice, and reference is made to that brief to avoid repetition here.

X.

The interpretation of the commodities clause contended for by the Government in the present case would make unnecessary an amendment by Congress forbidding railroads to transport in interstate commerce the products or property of corporations in which their only interest is the ownership of stock.

It was suggested during the oral argument that the situation now presented by the Government may be met by Congress by an amendment to the commodities clause forbidding railroads to transport in interstate commerce any commodity belonging to a corporation in which they own stock. On the previous appeal of these cases the Government insisted that the statute, as it stands, accomplishes this very result. But this court held otherwise, and it

was brought to that conclusion in part by what it termed "the far-reaching consequences" that would follow a denial to the railroad companies of the right, given them by their State charters, to invest in the stock of other companies, and also because, as the court said, "of the questions of constitutional power which would arise if that construction was adopted."

The interpretation which the Government now submits as entirely consistent with, and expressly embraced within, the construction put upon the statute by the opinion of this court on the previous appeal would avoid the far-reaching consequences suggested and the questions of constitutional power that would arise if Congress should forbid railroads to transport in interstate commerce commodities owned by other corporations in which the only interest of the railroad is that of a stockholder.

There is no basis in a sound public policy which would justify a denial to railroad companies of the right to invest their funds in the stock, or in all the stock, of other corporations and to transport in interstate commerce the commodities of such corporations. The statutes against discriminations and rebates, and the enforcement of them by the Interstate Commerce Commission might be relied upon to prevent any injustice or favoritism which would be induced by such relationship. But where the company whose stock is owned by the railroad is not a

bona fide separate and distinct corporation, conducting its own business and protecting its own interests, but is organized and maintained as a mere branch of the carrier's business, all the evils which the commodities clause was enacted to prevent will continue, without any regulating authority to prevent or mitigate them. When a railroad company organizes a subsidiary corporation to own the commodities it transports, not for the purpose of investing its funds but to secure a monopoly of the commodity, and to make its profits not out of the production and sale of the commodity but out of the transportation of it, the inducement of the carrier will be to increase the rates of transportation to all, so that no one can afford to deal in the article except the carrier which transports it.

The consequences of confirming in the railroads of the country such unlimited power are well stated in the English case (*Atty. Gen.* v. *Great Nor. R. R. Co.*, 29 L. J., Ch. N. S., 794), to which attention was called by this court in the *New Haven case*, 200 United States, at page 393.

We submit that only such considerations as these would justify further legislation by Congress forbidding railroads engaged in interstate commerce to transport in such commerce the commodity of any company in which they own stock. But such legislation is unnecessary to eradicate the evils

sought to be removed by the enactment of the commodities clause, if that clause is enforced as we believe this court has construed it, by limiting the cases in which railroads may transport the commodities of other corporations to those in which the other corporation is in law and in fact separate and distinct from the railroad and not a mere branch of its business.

Respectfully submitted.

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Attorney General.

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Special Assistants to the Attorney General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 537.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

ERIE RAILROAD COMPANY.

No. 538.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

No. 539.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These cases come here on appeal from the Circuit Court of the United States for the Eastern District

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of Pennsylvania. They were instituted June 5, 1908, under the commodities clause of the Hepburn Act (34 Stat., 584), at the same time that the suit against the Lehigh Valley Railroad Company (No. 536) was instituted. The Circuit Court dismissed the complaint in each of these cases (164 Fed., 215), and they were then appealed to this court, which reversed the decree below on May 3, 1909 (213 U. S., 364), and remanded each case "for further proceedings in conformity with the opinion of this court." (No. 537, Rec., p. 202; No. 538, Rec., p. 83; No. 539, Rec., p. 20.)

After the three cases had been reinstated upon the docket of the Circuit Court, the United States moved for decrees dismissing the bills of complaint without prejudice. (No. 537, Rec., p. 204; No. 538, Rec., p. 85; No. 539, Rec., p. 21.) These motions were denied without opinion, and thereupon, on motion of counsel for the defendants, the court dismissed the complaints.

These were three of the six suits originally instituted in order to determine the constitutionality of the commodities clause and its correct interpretation. When the cases, after reversal by this court, went back to the Circuit Court, the Government selected the case against the Lehigh Valley Railroad Company as a test case, in order to present the question whether the United States was not entitled to relief if it should plead additional facts showing the relations existing between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company.

The Government asked leave to file an amended bill of complaint in the Lehigh Valley Railroad case, in order that it might bring the pleadings and the statement of the cause of action within the construction placed upon the commodities clause by this court. It seemed inadvisable to institute three other suits of a similar character against these three defendants, and for these reasons the Government asked that the suits be dismissed without prejudice. The absolute dismissal will operate as a bar to the institution of any further suits in case the Government should prevail on the appeal in the Lehigh Valley case. (See Point IV of the brief in No. 536.)

The assignments of error are the same in each case and are as follows:

I.

The complainant having filed a bill of complaint praying an injunction under the fifth paragraph of the first section of the act to regulate commerce, as amended by the act approved June 29, 1906, commonly called the "Commodities clause," in which bill it was stated in effect that the Erie Railroad Company was transporting certain coal in violation of the commodities clause; and such proceedings having been had in said Circuit Court that said bill was dismissed by the Circuit Court on the ground that said act of Congress was unconstitutional and void, and complainant having prosecuted an appeal to the United States Supreme Court, and that court having construed said act, and having held it to be

constitutional as so construed, and having remanded the case to the court below for further proceedings in conformity with the opinion of the Supreme Court, and the complainant on the filing of the mandate in the court below, and on the reinstatement of the case in that court, having moved that the court dismiss the complaint without prejudice, the Circuit Court erred in denying said motion of complainant.

II.

The court having denied the motion that the court dismiss the complaint without prejudice, the Circuit Court erred in dismissing the bill of complaint absolutely.

III.

The Circuit Court erred in dismissing the bill of complaint absolutely for that the proceedings herein were commenced with the object and purpose of settling the differences between the complainant and the defendant concerning the meaning of the commodities clause and the power of Congress to enact it as correctly interpreted, and on said appeal to the United States Supreme Court that court construed the commodities clause and held it to be constitutional as so construed, and remanded the case for further proceedings in conformity with its opinion; but as the bill of complaint herein did not state a cause of action within the construction placed upon the commodities clause by the Supreme Court, by reason of the omission of certain allegations of fact

setting up the relations existing between the defendant and certain coal companies, and accordingly the pleading of complainant was defective, the said bill of complaint should have been dismissed without prejudice, for said dismissal without prejudice would have enabled the complainant to file a new complaint in another action for the same cause of action, whereas the absolute dismissal of the bill by the Circuit Court constitutes a bar to any further litigation of the same subject between the complainant and the defendant, and accordingly said Circuit Court erred in dismissing the bill of complaint absolutely.

Each of the three defendant railroads owns practically the entire capital stock of one or more coal companies, each of these coal companies being operated by the railroad in the manner in which the Lehigh Valley Coal Company is operated by the Lehigh Valley Railroad Company. These relations are sufficiently described in the amended bill of complaint printed in the Lehigh Valley Record. (No. 536, pp. 142–147.) See also the brief in the Lehigh Valley case, pages 19 to 32.

With respect to each of the three defendants considered in the present brief, to wit, the Erie Railroad Company, the Central Railroad Company of New Jersey, and the Pennsylvania Railroad Company, the Government is entitled to a dismissal without prejudice, in order that it may bring new bills of complaint, involving the same cause of action, but in

which the United States will be able to plead and to prove that in one or more instances the coal companies, of which the railroads own the stock, are not bona fide, separate, and distinct corporations, but are mere departments of the railroads, and are managed as to all their business in the production, transportation, and sale of coal not by their own officers but directly by the railroads. That is to say, the Government is entitled to an opportunity to show that the railroads are now violating the so-called "Commodities clause" by transporting in interstate commerce a portion of the very coal involved in the original cases which were before this court, and are violating the act referred to by the use of a device in the form of pretended coal companies, which are not bona fide, separate, and distinct corporations, as defined by this court on the former appeal of these cases, but are mere adjuncts and agencies of the railroads, which have the effect of concealing the railroads' ownership of the coal in question, while the fact is that the railroads own the coal transported, and through their own offices and employees directly supervise and control the production, transportation, and sale of the coal, and are at no time dissociated from direct authority over the commodity transported from the time it is produced until it is sold in the market.

Point IV of the argument in the brief of the United States in the Lehigh Valley case (No. 536) is applicable to these cases, and is herein referred to. In each of these cases counsel for the railroads and for

the Government entered into a stipulation similar to that printed in the brief in the Lehigh Valley case, pages 53 and 54 (No. 537, Rec., p. 197; No. 538, Rec., p. 77; No. 539, Rec., p. 12).

The absolute dismissal bars the United States from instituting any further proceedings in respect to the same cause of action. See brief in No. 536 pp. 53–64.

For these reasons it is respectfully submitted that the judgment of the Circuit Court should be reversed.

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Attorney General.
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Special Assistants
to the Attorney General.

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JAMES H. McKENNEY,
Clerk.

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OCTOBER TERM, 1910.

IN THE

Supreme Court of the United States.

UNITED STATES OF AMERICA, Appellant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

No. 539.

File No. 22148.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF ON BEHALF OF THE PENNSYLVANIA RAILROAD COMPANY, APPELLEE.

JOHN G. JOHNSON,
Of Counsel.

Allen, Lane & Scott, Prs., Phila.

In the Supreme Court of the United States.

United States of America, Appellant,

vs.

The Pennsylvania Railroad Company.

October Term, 1910,

No. 539.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF ON BEHALF OF THE PENNSYLVANIA RAILROAD COMPANY.

STATEMENT OF THE CASE.

In its opinion disposing of the original appeal taken in the present suit, together with the appeals taken in the five other suits heard at the same time, this Court construed that paragraph of Section 1 of the Hepburn Act, known as the Commodities Clause, as follows:—

> "We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions:

(*a*) When the article or commodity has been manufactured, mined or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (*b*) When the carrier owns the article or commodity to be transported in whole or in part; (*c*) When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced or owned, etc., by a bona fide corporation in which the railroad company is a stockholder." United States *vs.* Delaware and Hudson Company, 213 U. S., 366 (1909), at page 415.

The bills and answers filed in the six suits, which were heard together and formed the subject matter of this decision, differed in certain material respects. Accordingly, the opinion of the Court closes with the following paragraph (page 418):—

"As the court below held the statute wholly void for repugnancy to the Constitution, it follows from the views which we have expressed that the judgments and the decrees entered below must be reversed. As, however, it was conceded in the discussion at bar that in view of the public and private interests which were concerned, the United States did not seek to enforce the penalties of the statute, but commenced these proceedings with the object and purpose of settling the differences between it and the defendants, concerning the meaning of the commodities clause and the power of Congress to enact it as correctly interpreted, and upon this view the proceedings were heard below by submission upon the pleadings, we are of opinion that the ends of justice will be subserved, not by reversing and remanding with particular directions as to each of the defendants, but by reversing and remanding

with directions for such further proceedings as may be necessary to apply and enforce the statute as we have interpreted it. And it is so ordered."

In the instant suit, the mandate from the Supreme Court to the Circuit Court, after formal recitals, concluded as follows:—

(Record, page 20.)

"You therefore are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

Whereupon, the Circuit Court reinstated the bill, denied the motion of the United States to dismiss the same without prejudice, and dismissed the same absolutely, for the reasons stated in its opinions filed March 7th, 1910, and printed on pages 22 and 23 of the Record, as follows:—

"Whereas it appears to the court upon the pleadings that the defendant, The Pennsylvania Railroad Company, is not transporting in interstate commerce from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any coal which has been mined, manufactured, or produced by it, and which it owns in whole or in part at the time of transportation, except such coal as is necessary and intended for its use in the conduct of its business as a common carrier, and in the opinion of the court is not violating the 'Commodities Clause' within the meaning of the clause as construed by the Supreme Court."

(Record, page 23):—

"Whereas, referring to the said opinion of the Supreme Court of the United States and in conformity thereto, it appears upon the pleadings in this cause, that the defendant Pennsylvania Railroad Company

is not transporting in interstate commerce from any State, Territory, or the District of Columbia, to any State, Territory, or the District of Columbia, or to any foreign country, any coal which has been mined, manufactured, or produced by it, and which it owned in whole or in part at the time of transportation, except such coal as is necessary and intended for its use in the conduct of its business as a common carrier."

The paragraphs of the bill referred to in these opinions are the third and fourth, which read as follows:—

"(3) That the defendant is, and has been continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of the entire capital stock of the Summit Branch Mining Company and of the Susquehanna Coal Company, corporations in the said State of Pennsylvania, and that it thus controls, and has been controlling, the election of the directors or managers of said coal companies. That said coal companies hold, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Luzerne, Northumberland, Dauphin, and Schuylkill, in the said State of Pennsylvania; but said coal lands and coal mines are, as they have been continuously since long before said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the direct management of their respective boards of directors, nearly all of whom are, in the case of each of said coal companies, as they have been for some time past, officers of the defendant. That by virtue of the ownership of the entire capital stock of said coal companies by the defendant, as hereinbefore stated, the defendant owns said coal lands and coal mines, and the anthracite coal therein or thereupon and mined, and being mined, therefrom, and has an in-

terest therein; and that, by virtue of the management of said coal companies by certain of the officers of the defendant, as hereinbefore stated, the operations of said coal companies, in the mining of anthracite coal have been, and are now being, carried on by and under the authority of the defendant.

"(4) That, moreover, the defendant is, at the present time, and has been for a period since long before the said first day of May, in the year nineteen hundred and eight, the owner of some part of the capital stock of the Mineral Railroad and Mining Company, a corporation of the said State of Pennsylvania, which holds, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the said counties of Luzerne, Northumberland, Dauphin and Schuylkill, which said coal lands and coal mines are being operated, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, in the mining of anthracite coal, by and under the direct management of a board of directors nearly all of whom are, as they have been for some time past, officers of the defendant. That, by virtue of such stock ownership, the defendant owns in part, and has an interest in, said last mentioned coal lands and coal mines and the anthracite coal therein or thereupon and mined, and being mined, therefrom; and that, by virtue of the management of said last mentioned coal company by officers of the defendant, as hereinbefore stated, the operations of said last mentioned coal company, in the mining of anthracite coal, are being carried on, as they have been in the past, by and under the authority of the defendant."

As will be observed, these paragraphs allege with respect to The Pennsylvania Railroad Company nothing more than an ownership of stock in mining companies, the product of which is from time to time transported by the

said The Pennsylvania Railroad Company over its rails in interstate commerce, and it follows, therefore, that the bill avers no violation of the Commodities Clause of the Interstate Commerce Act, as construed by the Supreme Court in that portion of its opinion in United States *vs.* Delaware and Hudson Company, above referred to and quoted at length.

ARGUMENT.

From the foregoing statement of the case it appears that the United States, of its own motion, moved the dismissal of the bill without prejudice, while the defendant moved to dismiss absolutely. It follows that the Government as well as the defendant recognized that the previous decision of this court in this suit required a dismissal of this bill, and the only question in issue between the parties was whether such dismissal should have been without prejudice, or should have been entered, as it was, without qualification.

It was not suggested, nor is it now contended, that there was any lack of jurisdiction in the Circuit Court, or that an action should have been brought at law, or that there were improper or insufficient parties, but the sole reason upon which the action of the Government can be said to have been predicated is that the averments of the bill did not make out a violation of the Commodities Clause, as that clause has been interpreted by this Court. In this connection it should be remembered that hearing in this case was had upon bill and answer, so that not only was there a failure to aver any violation of the Act, but by the same token there was a failure either to prove or to offer to prove such violation, and necessarily, therefore, the only course open to the Circuit Court was the dismissal of the bill upon the merits.

Yet the Government, though unable to deny the defective character of its pleadings and proofs, claims that such dismissal should have been without prejudice.

It should be observed, at the outset, that the complainant did not set forth of record any facts in addition to those recited in the bill upon which it might desire to rely in order to establish any violation of the provisions of the Commodities Clause as interpreted by this Court. It is significant also that in the assignments of error no such facts are specifically set forth. The third assignment is the only one in which any reference whatever is made to the possible maintenance of another suit under new allegations, and yet even in this assignment there is not set forth a single specific fact which the complainant would expect to allege and prove so as to make out a violation of the Commodities Clause. On the contrary, the assignment merely refers generally to "the omission [in the original bill] of certain allegations of fact setting up the relations existing between the defendant and certain coal companies" without specifying a single fact so omitted; and this, too, in the face of the recitals of the bill and answer setting forth at length and with elaborate detail the relations between the defendant and these coal companies. Does the Government contend that these recitals were incorrect? If so, in what respect? If correct, what additional facts does the Government desire to add to those already alleged? There is a significant failure to specify such facts, and, instead, the assignment is so vague and general in its language as to afford no satisfactory predicate for denying the defendant the right to have this litigation brought to an end. In short, the Government has suggested neither in its assignment of error, nor otherwise, any ground for believing that there has been a violation of the Commodities Clause on the part of The Pennsylvania Railroad Company, defendant herein.

Failure of the Government in this regard is surely of material significance. There can be no doubt but that the bill in this suit was drafted with every possible care and with a desire to incorporate therein every averment which would tend to strengthen the Government's contention that there had been a violation of the Commodities Clause. When, therefore, after an elaborate hearing on bill and answer first in the Circuit Court and on appeal in this Court,

and when on a further hearing before the Circuit Court as to the form of decree to be entered in obedience to the mandate of this Court, the Government fails to specify with particularity any averments in addition to those appearing in the bill as originally drawn, it is respectfully submitted that this must be regarded as fatal, and that the dismissal of the bill which it demands—which dismissal it admits to be the proper disposition to be made of the suit by the lower court—should be without qualification.

This Court will remember that the six suits which involved the construction of this so-called Commodities Clause, and which were heard at one time, related to different alleged violations of the provisions of the law, so that the decree entered by this Court was the natural decree under the circumstances, in view of the fact that the interpretation placed upon the act involved different decrees in the different suits, and the purposes of the appellate tribunal could best be subserved by remanding the cases with directions to the Circuit Court to enter in each particular suit a decree appropriate thereto under the construction of the act placed upon it by this Court.

It will be noted further that the opinions of the Circuit Court, refusing the Government's motion to dismiss the bill without prejudice, and granting the motion of the defendants to dismiss the bill absolutely, specifically set forth the reasons for such action. (See above, "Statement of the Case," page 3.) Reference is there made to the entire failure of the Government to show any violation of the Commodities Clause, and since the Government's failure in the premises goes to the merits, and is not in any sense a failure in any formal or technical phase of the case, it is difficult to understand on what theory the Government can hope to render plausible its contention that the dismissal of the bill should have been without prejudice.

Foster, in his book on Federal Procedure, Volume II, § 300 (4th Ed.), states: "A dismissal without prejudice is usually ordered when a bill is dismissed for want of

parties, or for want of jurisdiction in a Federal Court, or for multifariousness, or for 'a slip or mistake in the pleadings or in the proof,' or because of the complainant's election to proceed at law." Obviously the motion of the Government falls within none of these clauses, and it is respectfully submitted that it is justified under none of the decisions which have been made with reference to this question of equity practice.

This Court has in several cases considered the propriety of dismissing a bill absolutely or without prejudice, and reference thereto will, it is believed, disclose no variance from the principles as stated by Foster.

Thus in House *vs.* Mullen, 22 Wallace, 42 (1874), where a demurrer was interposed to a bill in equity and sustained on the ground of misjoinder of parties, the Court held that the bill should have been dismissed without prejudice because:—

> "It does not and cannot, in the nature of things, conclude either party upon the merits of the matter in controversy, and the plaintiffs, or any one of them, should be at liberty to bring another bill, with proper parties, in regard to the subject matter of the first one. And the right to do this cannot be doubted when it appears plainly that the first bill was dismissed either for want of necessary parties or for a misjoinder of parties, or when by the terms of the decree the bill is dismissed without prejudice.
>
> "But neither of these things appear in the present case. There are grounds stated in the demurrer which would, if sustained, be a bar to any other suit, to wit, staleness of the claim, statute of limitations, and long acquiescence in the possession and claim of title by defendants. It does not appear by the decree, or by the order sustaining the demurrer, on which of the grounds set out in the latter it was sustained, or on what ground the bill was dismissed." (Page 46.)

Now, in the case at bar, the Circuit Court has set forth with particularity the reasons for its dismissal of the pres-

ent bill, reasons which relate to the merits and not to defects such as those referred to in the House Case, and obviously the Government cannot contend that these facts do not justify such dismissal, since it has itself made a motion for this disposition of the bill; nor, it is respectfully submitted, can it successfully contend that a dismissal of the bill founded on these allegations should be without prejudice, since it is not pretended that there is any failure of jurisdiction or want of parties; and, necessarily, under the opinion of the court in the Commodities Clause case, any bill founded on these averments, and on these alone, must be dismissed. In the light of these considerations, it is difficult to perceive what objection the Government can now make to the decrees entered by the Circuit Court which bear on their face the reasons underlying them and the scope and effect which should be accorded them.

Another case decided by this court, having reference to this question, is the case of Texas & Pacific Ry. Co. *vs.* Interstate Transportation Co., 155 U. S., 585 (1895). In this case, the complainant, Texas & Pacific Railway Company, had petitioned for an injunction against the defendant, the Interstate Transportation Company because this latter company was conducting its operations on the waters of a certain river during a flood in such a manner as to endanger a bridge of the railway company across the river. The case did not reach this Court until four years after the filing of the bill, and only at a time when the exigency created by the existence of the flood had long since passed. This Court accordingly sustained the lower court in dismissing the bill, but ordered such dismissal without prejudice because, as pointed out on page 589 of the opinion, the situation alleged in the bill, had it continued to exist, might conceivably have required equitable relief. The bill, therefore, did not, as does the bill in the present case, fail necessarily and under all circumstances to establish a case, but merely failed to do so in view of the changed conditions existing at the time the appeal reached this Court.

The dismissal was obviously not on the merits, and it was no doubt for this reason that this Court took care to point out the possible equity of the bill under the conditions existing at the time it was filed, and to make clear that its dismissal was for the reason above stated, and consequently without prejudice to the filing of a similar bill should the circumstances make equitable relief the only adequate remedy.

In Dowell *vs.* Mitchell, 105 U. S., 430 (1881), the following rule is laid down (page 432):—

> "The rule is that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice."

In accordance with this rule, the bill filed in this case is dismissed because of the Court's opinion that an adequate remedy at law existed in favor of the plaintiff.

In Kendig *vs.* Dean, 97 U. S. 423 (1878), a corporation not made a party to the suit proved to be an indispensable party to any relief which the complainant could secure from a court of equity, and it is therefore held that the bill should have been dismissed without prejudice. This court says (page 426):

> "The Circuit Court, although it dismissed the bill, did so on the merits, and that decree would bar the complainant from any other suit in which Dean's right to this stock might be contested. It should have been dismissed without prejudice, for want of a necessary party who was not brought before the court."

Gaylords *vs.* Kelshaw, 1 Wallace 81 (1863), presents another illustration of the modification of the decree of a lower court dismissing a bill so as to constitute it a dis-

missal without prejudice because of lack of jurisdiction in the court to entertain the bill.

The same result is accomplished in Hollins *vs.* Brierfield, etc., 150 U. S., 371 (1893), by dismissing the bill expressly for want of jurisdiction.

In Walden *vs.* Bodley, 14 Peters, 156 (1840), this Court says (page 161):—

> "A decree dismissing a bill generally, may be set up in bar of a second bill, having the same object in view; but the court dismissed the first bill on the ground that they had no jurisdiction, which shows that the case was not heard on its merits."

In Hartell *vs.* Tilghman, 99 U. S., 547 (1878).

This Court, in dismissing the bill which was filed for the protection of certain patent rights, having found that there was no jurisdiction in the Circuit Court, states, in closing its opinion (page 556):—

> "The decree of that court will, therefore, be reversed, with directions to dismiss the bill without prejudice; and it is so ordered."

In Durant *vs.* Essex Company, 7 Wallace, 107 (1869), the facts were as follows (page 108):—

> "Durant filed a bill, in October, 1847, against the Essex Company, seeking to hold it liable for certain real estate. The bill was finally 'dismissed.' An appeal was taken to this court, where, after hearing the case, the judges were equally divided in opinion; and in conformity with the practice of the court in such cases it ordered that the decree of the court 'be affirmed with costs.'
>
> "The complainant, conceiving that as the judgment in this court was by a bench equally divided, there had been no decision of his case by the court of last resort, filed another bill—the bill in the court

below—for the same relief in the same matter as he had filed the one before.

"The defendant pleaded that the former suit and decree in this court—which the plea averred were made after testimony was taken on both sides, and the case heard on its merits and argued by counsel—were a bar to the present bill. This was determined by the court below to be so; and the mandate of this court being filed, the complainant moved for leave to discontinue the suit, or that the bill be dismissed without prejudice. But the court refused leave, and dismissed the bill, no words being put in the decree that showed that the dismissal was other than an absolute one."

The case was then appealed to this Court, where Mr. Justice Field delivered the opinion of the court and, with regard to the questions under discussion, stated as follows (page 109):—

"The decree dismissing the bill in the former suit in the Circuit Court of the United States being absolute in its terms, was an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as 'without prejudice,' or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits.

"Accordingly, it is the general practice in this country and in England, when a bill in equity is dismissed without a consideration of the merits, for the court to express in its decree that the dismissal is without

prejudice. The omission of the qualification in a proper case will be corrected by this court on appeal.

"In the case in the Circuit Court we are not left to conjectures, or to presumptions, as to what was intended by the decree. The plea of the defendants avers, that testimony was taken on both sides, and that the case was heard on its merits, and argued by counsel. And when the mandate of this court was filed, the complainant moved for leave to discontinue the suit, or that the bill be dismissed without prejudice; but the motion was denied and the decree was affirmed."

The utmost that can be asked under the decisions where there is a dismissal because the bill is defective in substance is that the court shall show the reasons for the dismissal.

Thus, in Peirsoll vs. Elliott, 6 Peters, 95 (1832), a bill praying that a certain deed should be surrendered and cancelled, and for further relief, was dismissed because on its face the deed was defective and void; but since the defendants in their answer insisted upon their own title, this Court said that a general dismissal of the bill with costs, the court assigning no reason for such dismissal, might be considered as a decree affirming the principles asserted in the answer, and accordingly it declared its opinion to be that the decree of the Circuit Court ought to be modified so as to express the principles on which the bill of the plaintiffs was to be dismissed. There is no suggestion, however, that such dismissal should be without prejudice.

Similarly in Miles *vs.* Caldwell, 2 Wallace, 35 (1864), where a bill had been filed to have the complainant's title quieted, and where one of the grounds upon which the bill was based was that the complainant had made valuable improvements for which he was entitled to compensation before his land was taken from him; the Court in dismissing the bill dismisses it without prejudice to any remedy of the complainant for compensation for the improvements made on the land in good faith.

On page 44 the following statement is made by the Court with respect to this branch of complainant's case:—

> "As regards the claim for improvements made in good faith by complainant, the matter is not alluded to by his counsel in this court at all. It is barely mentioned by the counsel for appellant, and no importance seems to have been attached to it either here or in the court below. Such a right must depend wholly upon the statutes of Missouri, and none are cited to us. We are unwilling to enter upon an investigation of the law and the facts both under such circumstances. Besides, without deciding the point, we may remark that upon an examination of the statute of Missouri on that subject, and looking to the policy which dictated it, it does not seem probable that it was intended to give this kind of relief to an unsuccessful defendant in ejectment, while he was still contesting the title of the plaintiff. As to this point, we incline to rule that the bill shall be dismissed without prejudice."

From the foregoing, it will appear that the dismissal without prejudice was well within the general rule that the matter was not presented in such form as to make out a case in equity, and accordingly the situation was similar in all respects to that presented by the cases showing a dismissal for want of jurisdiction.

Now the decree of the Circuit Court dismissing the bill filed in the instant case clearly sets forth the reasons therefor, and this is the limit to which the decree may go where the dismissal is on the merits.

It is respectfully submitted that the foregoing decisions establish conclusively that a bill will not be dismissed without prejudice except where there is a lack of jurisdiction in the court, or where parties have been improperly joined or proper parties have not been joined, or where the complainant should seek his redress at law, or where the dismissal results from some other cause not involving the

merits of the case. But where the complainant allows the case to proceed to hearing on bill and answer and fails both before the court of first instance and the appellate court to establish any ground for equitable relief not because of any formal or technical defect in his case, but because his bill and proof present no basis for the action of a court of equity, the defendant is entitled to a dismissal absolutely.

Mr. Justice Field's opinion in the Durant Case, *supra*, shows clearly that this Court regarded a dismissal on the merits and a dismissal absolutely as practically synonymous terms. And they should be. For a defendant is certainly entitled, as much in a suit in equity as in an action at law, to the advantages that result from a favorable termination of the case. The complainant cannot allege any inadvertence in the drafting of its pleading or in the submission of its case. The only possible ground for its motion must be its mistake as to the law applicable to this suit, and surely this cannot constitute a ground for the dismissal of a case without prejudice after said case has been fully and patiently heard and considerately determined.

There is no pretense of after-discovered evidence, and in fact no specific reference whatever to definite facts which are supposed to be sufficient to resurrect the complainant's case, and the failure of the Government in this regard is particularly significant when reference is had to the allegations of the bill and answer, and attention is given to the elaborate detail with which are explained the relations of this defendant with the mining companies named.

It is believed, therefore, that the facts in this particular case as well as the previous decisions of this Court justified and required the decree entered by the Circuit Court dismissing the bill absolutely.

The practice in the lower Federal Courts is apparently fully in accord with the principles upon which this Court has from time to time acted. Thus, see, in particular, Indian Land & Trust Co. *vs.* Shoenfelt, 135 Fed., 484 (1905), where the Circuit Court of Appeals of the Eighth Circuit, says on page 487:—

"The record in this case does not disclose whether the decree of dismissal of the court below contains a provision which clearly shows that the suit was dismissed because the court had no jurisdiction of it in equity, or a provision that it was dismissed without prejudice. It does, however, contain an opinion upon the merits of the case, from which it is inferred that the decree evidences a dismissal upon the merits. A general decree of dismissal of a suit in equity, without more, renders all the issues in the case *res adjudicata,* and constitutes a bar to an action at law for the same cause. Hence, when a court of equity has no jurisdiction of a suit, the decree of dismissal must expressly adjudge that it is rendered for that reason, or must expressly provide that it is made without prejudice, to the end that the complainant may resort to his action at law for any damages he may sustain if he is so advised. Mitchell *vs.* Dowell, 105 U. S., 430, 26 L. Ed., 1142; Cecil National Bank *vs.* Thurber, 59 Fed., 913, 914, 8 C. C. A., 365, 367; Russell *vs.* Clark, 7 Cranch, 69, 90, 3 L. Ed., 271; Hooven, Owens & Rentschler Co. *vs.* John Featherstone's Sons, 49 C. C. A., 229, 233, 111 Fed., 81, 85; House *vs.* Mullen, 22 Wall., 42, 46, 22 L. Ed., 838; U. S. *vs.* Pine River Logging & Improvement Co., 78 Fed., 319, 325, 24 C. C. A., 101, 107; Speer *vs.* Board of County Commissioners, 88 Fed., 749, 752, 32 C. C. A., 101, 105."

The same principles are laid down in Fowler *vs.* Argood, 141 Fed., 20 (1905).

Particular reference may also be made to Lake, etc. R. R. Co. *vs.* Ziegler, 99 Fed., 114 (1900). In this case, *the lower court had dismissed the bill without prejudice,* and both sides appealed. The Circuit Court of Appeals of the Seventh Circuit, decides that the bill shows no ground for equitable relief, and dismisses the same absolutely. This case apparently decides clearly that the only dis-

missal proper in a suit which fails on the merits is an absolute dismissal.

In England the rule is believed to be the same. Thus in Mayor, &c., of Gloucester *vs.* Wood, 3 Hare, 131 (1843), the Vice Chancellor (Sir James Wigram) in dismissing a bill filed against an executor says, at page 148:—

> "There is one other point to which my attention was directed, and which I have very anxiously considered: I was asked if I came to the conclusion that the plaintiffs' claim could not be established upon this record to dismiss the bill without prejudice to the right of the plaintiffs to file a new bill. It certainly is a great satisfaction to me to consider that any conclusion I can come to upon that point will be of little practical moment; for, on a question of such magnitude, it is impossible that the decision of one court can satisfy either party; but I have, after much consideration, come to the conclusion that I ought not to insert that reservation. The bill was filed after the lengthened discussion in the Ecclesiastical Court, and after the decision in the Privy Council. The parties had, therefore, before them every fact which could be necessary to guide their judgment, and the bill was filed under the advice of the most able and experienced counsel. The conclusion to which they came (and I am very far from thinking that it was not a sound exercise of their judgment) was, that they should put their case simply upon the construction of the papers, without going into any collateral matters. That conclusion having been come to, upon a full view of every fact which the parties now know, I must consider that they have consented to rest their litigation upon that state of circumstances, and therefore that the order dismissing the bill ought to be made in an unqualified form."

Furthermore, decisions in the State Courts show that this practice is a general one.

Thus, in Reed *vs.* Welsh, 74 Ky., (11 W. P. D. Bush) 450 (1875), the court in dismissing the bill says (page 464):—

> "We perceive no reason why the cross-petitions of the appellants should not have been dismissed absolutely. The issues had been fully made up more than ninety days before the submission of the cause; and as the cause was regularly submitted without any reason being shown why the appellants were not ready for trial, and as they chose not to dismiss, as they might have done, but to await the event of the trial, their cross-petitions should have been dismissed absolutely."

See also Clackson *vs.* Scrogins, 2 T. B. Monroe (Ky.) 52 (1825), where the court of appeals says:

> "It remains to remark, on the fourth assignment of error, by which it is contended, that the bill should have been dismissed without prejudice. The bill of exceptions states, that the bill was dismissed, because there was not sufficient evidence to show that Mosby's survey covered any part of the land which the complainant stated was covered. That the bill is not supported by sufficient evidence, as was the present case, we apprehend, can never be a reason for a qualified dismissal. If there was any evidence in existence, that would have established any material allegation in the complainant's bill, he should have procured it, or, at least, shown some reason why he did not. If there was no evidence in existence by which the complainant could have established the interference of Mosby's claim or other material facts in his bill, it would have been useless to have dismissed it without prejudice."

To the same effect is Martin *vs.* Reese, 57 S. W., 419 (1899), where the Court of Chancery Appeals of Tennessee holds (page 422):—

> "According to complainant's contention, as we understand it (if a point to be presently mentioned

be not well taken), we should send the case back to the Chancery Court, with direction to the chancellor to dismiss the bill without prejudice, or to give the complainant leave to withdraw his application to have the cause heard on bill and answer, and remand the cause for proof. The terms of the rule, as stated above, indicate that it should be applied only to cases where the answer does not admit enough for the complainant to have a decree; but here the answer does contain sufficient admissions to enable the complainant to obtain a decree for the amount of his debt, less the usury. Moreover, we do not think the rule renders it incumbent upon the court to send back a case which has progressed as far as this has, with the directions above indicated. Under the circumstances, we do not think it would be proper to deprive the defendant of the advantage he has gained by complainant having set the cause for hearing on bill and answer. The whole complexion of the case would be changed thereby, inasmuch as the defendants cannot be allowed to testify as to the transaction with the decedent. To allow the complainant to press the cause to a hearing upon bill and answer, and to see it proceed to a final adjudication in the court below, and then to an appeal to the Supreme Court and after this to send the case back to be tried all over again, by relieving the complainant of the effect of his motion to set the cause for hearing on bill and answers, seems to us to be merely to allow the complainant to experiment with the process of the court."

Furthermore in Dogget *vs.* Lane, 12 Mo., 215 (1848), the court says (page 222):—

"Although the propriety of dismissing the bill generally, notwithstanding the motion of the complainants to have it dismissed without prejudice, is not discussed in the written argument submitted to the court, yet as it is made a point in the assignment of errors, it is

proper to dispose of it. After the case was fully submitted at the hearing, without any pretence that any additional facts could be procured, we think the court was fully justified in making a final decree. There must be an end to litigation in chancery as well as in a court of law. The chancellor has doubtless a discretion in such matters, but there was nothing in this case to show that this discretion was unsoundly exercised."

And again in Rumbly *vs.* Stainton, 24 Ala., 712 (1854), in its opinion dismissing the bill the court says:—

> "It has been requested by the solicitor for the appellees, that in the event the court should conclude to revise the decree, and dismiss the bill, such dismissal should be without prejudice. There is no special reason in the record to justify such a course, but much, very much, to forbid it, and none is given outside of the record. There must be a time for litigation to end; and when the parties have had every opportunity to hunt up their testimony, and prepare their cases on the merits, as seems to have been the case here, we are not inclined to indulge a spirit of useless and vexatious litigation, which from all that appears here, would be the result in this case."

Chief Justice Shaw's view appears in Bigelow *vs.* Winsor, 1 Gray, 299 (1854), where, in discussing the effect of a prior dismissal of an equity bill, he says, at page 301:—

> "That this is a final judgment upon the merits, that is, upon the matters put in issue, there can be no doubt. Sometimes, indeed, a party plaintiff in equity, who, because he is not prepared with his proofs, or for other reasons, desires not to go into a hearing, but rather to have his bill dismissed, in the nature of a discontinuance or nonsuit in an action at law, may be allowed to do so; but we believe the uniform practice in such case is, to enter 'dismissed without preju-

> dice.' So, when a decree against the plaintiff in equity proceeds on the ground that he has an adequate remedy at law, the course is to dismiss it without, prejudice to an action at law."

And see in accord:—

Foote *vs.* Gibbs, 1 Gray, 412 (1854).

From this passage of Chief Justice Shaw's opinion it would appear that there was no connection in his mind between dismissal on the merits and dismissal without prejudice.

It is believed that the foregoing summary of the more important cases relating to the question under discussion establishes beyond controversy that where a case has been fully heard and decided on the merits, the disposition thereof should be final. In brief it is but an application of the general principle that the plaintiff having had a full oportunity to present his case in court must abide by the result of an adverse decision.

For these reasons this defendant, The Pennsylvania Railroad Company, believes itself entitled to the absolute dismissal of the bill filed in this suit by complainant, the United States, and therefore respectfully prays that the decree of the Circuit Court appealed from be in all things affirmed.

JOHN G. JOHNSON,
Of Counsel for The Pennsylvania Railroad Company.

UNITED STATES *v.* LEHIGH VALLEY RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 536. Argued January 5, 1911.—Decided April 3, 1911.

The rule that the allowance of amendments to pleadings is discretionary with the trial court and not to be reviewed on appeal except in case of gross abuse does not apply where such discretion is controlled by this court and the refusal to allow an amendment defeats the evident purpose of this court in remanding the case.

Where the refusal of the Circuit Court to allow an amendment is in conflict with the opinion and mandate of this court there is an abuse of discretion which this court can and will correct on appeal even if such abuse be the result of misconception of the opinion and of the scope of the mandate.

While the decision of this court in this and other commodities clause cases, 213 U. S. 366, expressly held that under the commodities clause stock ownership by a railroad company in a *bona fide* corporation, irrespective of the extent of such ownership, does not preclude the railroad company from transporting the commodities manufactured, produced or owned by such corporation, it is still open to the Government to question the right of the railroad company to transport commodities of a corporation in which the company owns stock and uses its power as a stockholder to obliterate all distinctions between the two corporations; and an amendment to the original bill in one of the commodities cases alleging such facts as show the absolute control by the defendant railroad company, through stock ownership, over the corporation whose commodities are being transported, is germane to the original bill and should have been allowed by the trial court.

By the operation and effect of the commodities clause a duty has been cast upon an interstate carrier not to abuse its power as a stockholder of a corporation whose commodities it transports in interstate commerce by so commingling the affairs of that corporation with its own as to cause the two corporations to become one and inseparable.

THE facts are stated in the opinion.

Mr. Wade H. Ellis, Assistant to the Attorney General, with whom *The Attorney General* and *Mr. Edwin P. Grosvenor,* Special Assistant to the Attorney General, were on the brief, for appellant:

The Government's right to proceed in this case is not foreclosed by the previous decision of this court in 213 U. S. 366. The facts now sought to be shown by the amendment of the Government in the court below are not the same as those which were before this court on the former appeal.

The stipulation of counsel in the original case was that the submission of the case on bill and answer should in no wise prejudice the parties in any suit or proceeding thereafter instituted.

In the recent case of *United States* v. *Reading Co.,* 183 Fed. Rep. 427, 461, 462, it has been found that the Lehigh Valley Coal Company is a mere department of the Lehigh Valley Railroad Company, and not an independent corporation.

The construction by this court of the commodities clause shows that it applies when the commodity has been manufactured, mined or produced by a carrier or under its authority and at the time of transportation the carrier has not in good faith dissociated itself from such commodity; when a carrier owns the commodity transported in whole or in part; and when a carrier at the time of transportation has an interest in the commodity, direct or indirect, but not including an interest represented only by the ownership of stock in a "separate," "distinct" and "*bona fide*" corporation.

It follows that in the present case the railroad company, as shown by the proposed amendment of the bill, is violating the commodities clause in two of the three ways indicated above.

Without regard to stock ownership, the coal transported by the Lehigh Valley Railroad Company was mined and produced "under its authority," and the railroad company has not dissociated itself from such commodity. *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Harriman* v. *Northern Securities Co.*, 197 U. S. 244; *N. Y., N. H. & H. R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 390. In other words, if the Lehigh Valley Railroad Company did not own a single share of the stock of the coal company in the present case it could not lawfully transport the coal, and certainly it cannot get that authority simply because it owns all the stock of the coal company.

The coal company is not a separate, distinct and *bona fide* corporation. *In re Watertown Paper Co.*, 169 Fed. Rep. 252; *In re Muncie Pulp Co.*, 139 Fed. Rep. 546; *Interstate Telegraph Co.* v. *Baltimore & Ohio R. R. Co.*, 51 Fed. Rep. 49.

It can make no difference in this case that the coal company was organized before the passage of the commodities clause and before the former decision of this court construing that act, for it is the effect of a relation between a railroad and a coal company, and not the motive, which constitutes a violation of the statute.

The fiction of a separate corporate entity will be disregarded whenever it is insisted upon as a protection to an illegal transaction. *In re Rieger, Capnor and Aultmark*, 157 Fed. Rep. 609; *Miller & Lux* v. *East Side Canal & Irrigation Co.*, 211 U. S. 293; *Lehigh Mining & Mfg. Co.* v. *Kelley*, 160 U. S. 327; *Gas Co.* v. *West*, 50 Iowa, 16; *Booth* v. *Bunce*, 33 N. Y. 139; *Bennett* v. *Minott*, 28 Oregon, 389; Morawetz on Corp., §§ 1, 227.

The court below erred in not allowing the Government to amend its bill of complaint; first, because it had no discretion in the matter; 3 Ency. Law & Prac. 579; *National Bank* v. *Carpenter*, 101 U. S. 567, 568; and second,

because if it had such discretion this was abused. *House* v. *Mullen*, 22 Wall. 42; *Rio Grande Dam &c. Co.* v. *United States*, 215 U. S. 266; *Texas & Pacific Railway* v. *Interstate Transp. Co.*, 155 U. S. 585; *Swan Land & Cattle Co.* v. *Frank*, 148 U. S. 603; *Kendig* v. *Dean*, 97 U. S. 423; *Durant* v. *Essex Co.*, 7 Wall. 107.

There are important considerations of public policy which weigh against any construction of the commodities clause which would offer inducements to the railroads to organize subsidiary companies to deal in commodities in competition with other shippers. There is no reason for denying to railroads the right to invest their funds in the stock of other corporations, where such other corporations are separate and distinct from the carrier's business. But where a railroad company organizes a subsidiary corporation not for the purpose of investing its funds but to make its profits out of the transportation of the commodity produced, the temptation of the carrier is to increase the rates of transportation to all so that no one can afford to deal in the article except the railroad which transports it. The consequences of confirming in the railroads such unlimited power are well stated in the English case of *Attorney General* v. *Great Northern R. R. Co.*, 29 L. J. Ch. (N. S.) 794, cited in the *New Haven Case*, 200 U. S. 393.

The interpretation of the commodities clause contended for by the Government in this case would make unnecessary an amendment by Congress forbidding railroads to transport, in interstate commerce, the product or property of corporations in which their only interest is the ownership of stock, for it would make vital and effective the act as it stands by so construing it as to forbid railroads to transport commodities of other corporations where such other corporations are not in fact separate, independent enterprises but are mere departments of the railroads. And this last was the real evil which the commodities clause was intended to remedy.

Mr. John G. Johnson, with whom *Mr. J. F. Schaperkotter* and *Mr. Frank H. Platt* were on the brief, for appellee:

The only question left in the case on its return to the Circuit Court was whether the defendant was violating the commodities clause by carrying the coal produced and owned by the Lehigh Valley Coal Company, whose capital stock was entirely owned by the defendant, and that of other coal companies in which the defendant had stock interests, entire or part, either majority or minority, respectively.

The complainant's motion for leave to file an amended bill of complaint was rightly denied.

The general replication had been filed and not withdrawn. Irrespective of Equity Rule 29, with which the Government wholly failed to comply, no cause was shown for leave to file an amended bill other than that which appeared on the face of the proposed amendment itself. Nothing had occurred since the original bill was filed except that this court had held that the Government's theory of the law was erroneous. There was no averment of after-discovered matter. The refusal of leave to amend the bill was discretionary, and is not reviewable. *Michigan Central Ry. Co.* v. *Pinkney*, 149 U. S. 194, 201; *Chapman* v. *Barney*, 129 U. S. 677, 681; *Bullitt Co.* v. *Washer*, 130 U. S. 142, 145.

The complainant's motion for a decree dismissing the bill of complaint without prejudice was rightly denied. *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138, 146; *Stevens* v. *The Railroads*, 4 Fed. Rep. 97, 105; *Chicago & Alton R. R. Co.* v. *Union Rolling Mill Co.*, 109 U. S. 702, 713; *Connor* v. *Drake*, 1 Ohio, 170.

A dismissal without prejudice would have seriously prejudiced the rights of the defendant. It was clearly within the discretion of the court to deny the motion for a dismissal without prejudice, which would have opened the

door for the bringing of a new suit in which the complainant would have all of the advantage growing out of the admissions set forth in the answer. *American Bell Telephone Co.* v. *Western Union Tel. Co.*, 69 Fed. Rep. 666, 670.

It was clearly within the discretion of the court to refuse to deprive the defendant of this right by means of a dismissal without prejudice. *Hershberger* v. *Blewett*, 55 Fed. Rep. 170, 171; *Flaherty* v. *McCormick*, 14 N. E. Rep. 846, 850; *Georgia Pine Turpentine Co.* v. *Bilfinger*, 129 Fed. Rep. 131; *Ebner* v. *Zimmerly*, 118 Fed. Rep. 818.

The decision of the Circuit Court was in conformity with the opinion of this court.

The character of a coal company,—whether it be *bona fide*, or not, within the meaning of this court—cannot depend on the extent or proportion of the capital stock held by the railroad company. A railroad company owning three-quarters, or more than half, of the stock of a coal company controls its management through election as completely as it would by owning the entire capital stock. The fact of entire or majority ownership, is, therefore, not logically more relevant to the issue of *bona fides* than minority ownership, unless this court intended to hold that every majority holding constitutes *mala fides*. Obviously the decision of this court is that the question of *bona fides* shall not depend on stock holding.

The relationship between the defendant and the coal company has from its inception existed under the direct authority of law, both of the State of Pennsylvania and the Federal Government. As to the State of Pennsylvania, under whose laws the coal company was organized, it is alleged and conceded that such organization and such relationship were allowed and encouraged by the legislative policy of the State of Pennsylvania. As to the Federal laws, there is the direct interpretation of the Interstate Commerce Act in the *Chesapeake and Ohio*

Case, 200 U. S. 361, 401, to the effect that the relationship was legal. And see *Haddock and Coxe Cases*, 4 I. C. C. Rep. 296, 535.

The relationship which the Government now seeks to have declared so lacking in good faith as to render the existence of the coal company a mere fiction, forms the basis of the very rights from which arose the grave and doubtful constitutional questions which this court found it unnecessary to decide. Upon the strength of the relationship existing between the defendant and the coal company millions of dollars have changed hands, pursuant to transactions whose good faith cannot be questioned.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This case is one of what were known as the commodities cases previously decided and reported in *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366. The controversy now is but a sequel to that disposed of in the previous cases. To understand the question now for consideration it is essential to have in mind the contentions which arose for decision upon the previous appeal and the disposition which was made of them. We therefore refer to those subjects.

The United States proceeded, both by suits in equity and mandamus, against certain railroad companies, including the Lehigh Valley, to prohibit them from transporting coal in interstate commerce in violation of what were deemed to be the prohibitions of the fifth paragraph of the first section of the act to regulate commerce as amended on June 29, 1906, usually referred to as the commodities clause of the Hepburn Act. The clause is as follows:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport

from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." 34 Stat. 584, c. 3591.

In effect, the contention of the Government was that the clause in question prohibited railroad companies from moving in the channels of interstate commerce articles or commodities other than the articles excepted by the provision which had been manufactured, mined or produced by the companies or under their authority or which were at the time of the transportation owned by them or which had been previously owned by them in whole or in part or in which the companies then or previously had any interest, direct or indirect. The Government, moreover, insisted that these general propositions embraced the movement by the companies in interstate commerce of a commodity which had been manufactured, mined or produced by a corporation in which the transporting railroad company was a stockholder, irrespective of the extent of such stock ownership. The railroad companies in effect defended the suits upon the ground that the statute as construed by the Government was repugnant to the Constitution. Each of the cases was submitted upon bill and answer and petition and return to the Circuit Court of the United States for the Eastern District of Pennsylvania, held by three circuit judges under the Expediting Act of February 11, 1903. 32 Stat. 823, c. 544. The submission in each case was made as a result of a stipulation between counsel "that the submission on bill and answer and any averment or admission in the pleadings of either party

shall in no wise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted, and shall be operative and take effect only with respect to the present suit and for the purpose thereof."

Treating the commodities clause in question as having the significance attributed to it by the United States the court held it to be repugnant to the Constitution. Judgments and decrees were accordingly entered, denying the applications for mandamus and dismissing the bills of complaint. The reasons which led to this action were expounded in one opinion, made applicable to all the cases, the court briefly but comprehensively stating the facts in each case which were relied upon by the Government as bringing the defendant corporation within the clause as the Government construed it. The cases were then brought here.

As was done in the lower court, the cases here were all disposed of by one opinion, the facts in each case as summarized by the court below being stated. In deciding the cases it became necessary first to ascertain the meaning of the commodities clause. In performing this duty the conclusion was reached that the clause did not have the far-reaching significance attributed to it by the Government and which had been substantially adopted by the court below, but on the contrary had a much narrower meaning. Attention was directed to the fact that the statute disjunctively applied four generic prohibitions, that is, it forbade a railway company from transporting in interstate commerce articles or commodities, 1, which it had manufactured, mined or produced; 2, which have been so mined, manufactured or produced under its authority; 3, which it owns in whole or in part; and, 4, in which it has an interest, direct or indirect. All these prohibitions, however, were held to have but a common purpose, "that is, the dissociation of railroad companies prior to transportation from articles or commodities, whether the as-

sociation resulted from manufacture, mining, production or ownership, or interest, direct or indirect."

In coming to determine whether the Government was correct in its contention that these prohibitions operated to prevent a railroad company from transporting a product because it was owned by or had been mined, manufactured or produced by a corporation in which the railroad company was the owner of stock, irrespective of the amount of such stock ownership, it was expressly decided that the prohibitions of the statute were addressed only to a legal or equitable interest in the commodities to which the prohibitions referred, that they therefore did not prohibit a railroad company from transporting commodities mined, manufactured, produced or owned by a distinct corporation, merely because the railroad company was the owner of some or all of the stock in such corporation.

Summing up its review as to the true construction of the commodities clause, the court held (p. 415) that it prohibited "a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (*a*) When the article or commodity has been manufactured, mined or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (*b*) When the carrier owns the article or commodity to be transported in whole or in part; (*c*) When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined or produced or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder."

Thus construed, the clause was held to be within the

power of Congress to enact. As this conclusion rendered it necessary to reverse the action of the court below which had been exclusively predicated upon the unconstitutionality of the statute, the question arose as to what disposition should be made of the cases. That is to say, the constitutionality of the statute being settled and its true meaning being expounded. the question was whether the cases should be finally disposed of or should be left in such a position as to give the Government the right to proceed to apply and enforce the prohibitions of the statute against the various corporations which were defendants if it deemed a good case existed for so doing. Disposing of this subject in the light of the consent upon which the cases had been tried in the court below, and of the error which had obtained as to the true meaning of the statute and of the consequent concentration of the attention of the court and of the parties to the question of the constitutionality of the statute, instead of its application to the facts, when correctly construed, it was determined that the decree should not conclude the right of the United States in the respective causes to further proceed to enforce the statute as construed, and hence that that subject should be left open for future action. Referring to this matter, it was said (p. 418):

"As the court below held the statute wholly void for repugnancy to the Constitution, it follows from the views which we have expressed that the judgments and decrees entered below must be reversed. As, however, it was conceded in the discussion at bar that in view of the public and private interests which were concerned, the United States did not seek to enforce the penalties of the statute, but commenced these proceedings with the object and purpose of settling the differences between it and the defendants concerning the meaning of the commodities clause and the power of Congress to enact it as correctly interpreted, and upon this view the proceedings were

heard below by submission upon the pleadings, we are of opinion that the ends of justice will be subserved, not by reversing and remanding with particular directions as to each of the defendants, but by reversing and remanding with directions for such further proceedings as may be necessary to apply and enforce the statute as we have interpreted it."

Accordingly, the mandate of this court provided that the cause "be, and the same is hereby, remanded to the said Circuit Court for further proceedings in conformity with the opinion of this court."

Upon the filing of the mandate the court below vacated its decree dismissing the bill in this (the equity) cause, and reinstated the case upon the docket. The United States then presented an amended bill and asked leave to file it. The amendment contained copious averments in regard to the actual relations existing between the railroad company and one of the coal companies mentioned in the original bill, viz., the Lehigh Valley Coal Company. In substance it was averred that as to this particular coal company the railroad company was not only the owner of all the stock issued by the coal company, but that the railroad company so used the power thus resulting from its stock ownership as to deprive the coal company of all real, independent existence and to make it virtually but an agency or dependency or department of the railroad company. In other words, in great detail facts were averred which tended to establish that there was no distinction in practice between the coal company and the railroad company, the latter using the coal company as a mere device to enable the railroad company to violate the provisions of the commodities clause. It was expressly charged that in consequence of these facts:

"The coal company is not a *bona fide* mining company, but is merely an adjunct or instrumentality of the defendant. The defendant is in legal effect the owner of

and has a pecuniary interest in the coal mined by the coal company, and which is transported by the defendant."

Not only was it thus charged that the railroad company used its stock ownership to so commingle the operating of the affairs of the mining company with its own as to render it impossible to distinguish as a matter of fact between them, but it was moreover expressly in substance charged that exerting its influence as the owner of all the stock of the coal company the railroad company caused the coal company to buy up all the coal produced by other mining companies in the area tributary to the railroad and fix the price at which such coal was bought so as to control the same and the transportation thereof and establish the price at which the coal thus ostensibly acquired by the coal company by purchase should be sold when it reached the seaboard.

It was charged that by these abuses the production, shipment and sale of all the coal within the territory served by the railroad company was brought within the dominion of that company practically to the same extent as if it was the absolute owner of the same. Finally it was alleged as follows:

"That by virtue of the facts hereinbefore set out and otherwise, and more particularly by virtue of the control, direction, domination, and supervision exercised by the persons who are the officers of the defendant railroad and by the defendant over all the operations of the said coal company, embracing the mining and production of said coal, the shipment and transportation of the same over the defendant railroad, and the sale thereof at the seaboard, it follows:

"First. That the coal company, not being in substance and in good faith a *bona fide* corporation, separate from the defendant, but a mere adjunct or instrumentality of the defendant, the defendant, at the time of transporta-

tion, has an interest, direct or indirect, in a legal or equitable sense, in said coal.

"Second. That said coal of said coal company is mined and produced under the authority of defendant, and the defendant at the time of transportation and before the act of transportation has not in good faith dissociated itself from all exercise of authority over said coal but continues to exercise authority over said coal at the time of transportation and over the subsequent sale thereof."

On the objection of the railway company the court denied the request of the United States for leave to file the amended bill. The United States then moved for a decree dismissing its original bill without prejudice, and after argument that motion also was denied. Thereupon counsel for the railroad company moved to dismiss the bill absolutely, and upon the statement of counsel for the United States that it "would not proceed any further in view of the fact that the proposed amendment had been disallowed," the court reached the conclusion "that the bill should be dismissed absolutely upon the allegations of the bill and answer." A decree to that effect was entered, and the Government prosecutes this appeal, relying for reversal upon the error which it is insisted was committed in refusing to allow the proposed amended bill to be filed and in dismissing the suit.

At the threshold it is insisted by the railroad company that the action of the court below in refusing to permit the proposed amendment, however germane that amendment may have been to the cause of action stated in the original bill and even although the subject-matter of the amendment was not foreclosed by our previous decision, is not susceptible of being reviewed, because the allowance of amendments to pleadings is discretionary with a trial court, and the action of the court below in refusing to permit the amendment, even though erroneous, may not be reversed for error unless a gross abuse of discretion was

committed. The principle is elementary, but is inapplicable to this case for a twofold reason: First, because the analysis which we have hitherto made of the opinion of this court on the prior hearing makes it certain that the undoubted object was not to foreclose the right of the Government to enforce in the pending causes the commodities clause as correctly construed, and therefore in this regard the discretion of the court below was controlled by the action of this court. Second, because, in view of the express reservations in the opinion and the explicit language of the mandate of this court, the conclusion cannot be escaped that an absolute abuse of discretion resulted from refusing to permit the amendment, even although such abuse was obviously occasioned by a misconception of the character of the action of this court and the scope of the mandate.

It remains only to consider, first, whether the proposed amendment was germane to the original cause of action, and if it was, whether it was foreclosed by our previous decision.

As to the first question. When it is borne in mind that the suit was brought by the Government to enforce as against the defendant the commands of the commodities clause, the fact that the proposed amendment was germane to such cause of action is too apparent to need anything but statement. Indeed, in the argument at bar on behalf of the railroad company this is in effect conceded, since it is insisted that the amendment should not have been allowed, because in substance its averments virtually constituted part of the original cause of action. And we think it is equally clear that the grounds of the amendment were not foreclosed by our former decision. While that decision expressly held that stock ownership by a railroad company in a *bona fide* corporation, irrespective of the extent of such ownership, did not preclude a railroad company from transporting the commodities manu-

factured, mined, produced or owned by such corporation, nothing in that conclusion foreclosed the right of the Government to question the power of a railroad company to transport in interstate commerce a commodity manufactured, mined, owned or produced by a corporation in which the railroad held stock and where the power of the railroad company as a stockholder was used to obliterate all distinctions between the two corporations. That is to say, where the power was exerted in such a manner as to so commingle the affairs of both as by necessary effect to make such affairs practically indistinguishable and therefore to cause both corporations to be one for all purposes. To what extent the amendment charged this to be the case will become manifest by again particularly considering its averments concerning the use by the railroad company of the coal company as a purchaser of coal, as also the direct charge made in the proposed amendment that by such acts the railroad company was enabled to control all or a greater portion of the coal produced in the region tributary to its road, and thus to dominate the situation and fix the price, not only at which all the coal could be bought, but at which it could be sold at the seaboard for consumption.

That the facts thus averred and the other allegations contained in the proposed amended bill tended to show an actual control by the railroad company over the property of the coal company and an actual interest in such property beyond the mere interest which the railroad company would have had as a holder of stock in the coal company is, we think, clear. The alleged facts, therefore, brought the railroad company, so far as its right to carry the product of the coal company is concerned, within the general prohibitions of the commodities clause, unless for some reason the right of the railroad company to carry such product was not within the operation of that clause. The argument is that the railroad company was so excepted, because any control which it exerted or interest

which it had in the product of the coal company resulted from its ownership of stock in that company, and would not have existed without such ownership. The error, however, lies in disregarding the fact that the allegations of the amended bill asserted the existence of a control by the railroad company over the coal corporation and its product, rendered possible, it is true, by the ownership of stock, but which was not the necessary result of a *bona fide* exercise of such ownership and which could only have arisen through the use by the railroad of its stock ownership for the purpose of giving it, the railroad company, as a corporation for its own corporate purposes, complete power over the affairs of the coal company, just as if the coal company were a mere department of the railroad. Indeed, such a situation could not have existed had the fact that the two corporations were separate and distinct legal entities been regarded in the administration of the affairs of the coal company. Granting this to be the case, however, it is in effect urged, as the railroad company held all the stock in the coal company, and therefore any gain made or loss suffered by that company would be sustained by the railroad company, no harm resulted from commingling the affairs of the two corporations and disregarding the fact that they were separate juridical beings, because ultimately considered they were but one and the same. This, however, in substance but amounts to asserting that the direct prohibitions of the commodities clause ought to have been applied to a case of stock ownership, particularly to a case where the ownership embraced all the stock of a producing company, and therefore that a mistake was committed by Congress in not including such stock ownership within the prohibitions of the commodities clause. We fail, however, to appreciate the relevancy of the contention. Our duty is to enforce the statute, and not to exclude from its prohibitions things which are properly embraced within them. Coming to

discharge this duty it follows, in view of the express prohibitions of the commodities clause, it must be held that while the right of a railroad company as a stockholder to use its stock ownership for the purpose of a *bona fide* separate administration of the affairs of a corporation in which it has a stock interest may not be denied, the use of such stock ownership in substance for the purpose of destroying the entity of a producing, etc., corporation and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation within the prohibitions of the commodities clause. In other words, that by operation and effect of the commodities clause there is a duty cast upon a railroad company proposing to carry in interstate commerce the product of a producing, etc., corporation in which it has a stock interest not to abuse such power so as virtually to do by indirection that which the commodities clause prohibits, a duty which plainly would be violated by the unnecessary commingling of the affairs of the producing company with its own, so as to cause them to be one and inseparable.

Deciding, as we do, that error was committed in denying leave to file the proposed amended bill, the decree below is reversed and the cause remanded with directions for further proceedings in conformity with this opinion.

UNITED STATES *v.* ERIE RAILROAD COMPANY.

SAME *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY.

SAME *v.* PENNSYLVANIA RAILROAD COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Nos. 537, 538, 539. Argued January 5, 1911.—Decided April 3, 1911.

Under the decision of this court in these and other commodities clause cases, 213 U. S. 364, there was no error in the Circuit Court dismissing the bill absolutely, the Government not having asked leave to amend, the stipulation to submit on bill and answer not having been withdrawn, and no violation of the law having been shown on the admitted facts.

Under such circumstances the decree must be affirmed whatever may be its scope and effect as *res judicata* in view of stipulations made in the court below.

THE facts are stated in the opinion.

Mr. Wade H. Ellis, Special Assistant to the Attorney General, with whom *The Attorney General* and *Mr. Edwin P. Grosvenor*, Special Assistant to the Attorney General, were on the brief, for the United States.

Mr. John G. Johnson for appellees. *Mr. Adelbert Moot* and *Mr. Geo. F. Brownell* submitted a separate brief for the appellee in No. 537.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

These three cases were embraced in the commodities cases previously before this court, and, like the *Lehigh*

Valley Railroad Company Case, No. 536, *ante*, p. 257, they are but sequels of the controversy pointed out in the opinion in that case as having been formerly passed upon in the opinion reported in *Sand Filtration Corporation* v. *Cowardin*, 213 U. S. 366. These cases, however, differ from the *Lehigh Valley Case* in this respect. Upon the filing in the Circuit Court of the mandate of this court the United States in each case, upon the same record on which the reversed decree was based, without offering to show any further facts, or withdrawing the stipulation to submit the cause on bill and answer referred to in the opinion in the *Lehigh Valley Case*, moved that the decree to be entered be "that the bill be dismissed without prejudice." This motion was denied, whereupon the court was informed that the Government did not intend to proceed further with the cause, and in each case a decree was entered dismissing the cause absolutely.

The error alleged is in substance that the Circuit Court erred in each case in dismissing the bill of complaint absolutely. But leave to amend was not asked, and as, upon the facts appearing and admitted on each record, no violation of the commodities clause was shown, the decree entered may properly be held to have been in strict "conformity with the opinion of this court." Whatever, therefore, in view of the stipulation made below, may be the scope and effect of the decree as *res judicata*, we see no reason for concluding that error was committed by the Circuit Court in refusing to qualify its decree. The decree in each case is, therefore,

Affirmed.